No. 17049

United States Court of Appeals

for the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX., AND GLENN A. PRICE, ET UX.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
For the District of Arizona

No. Civ.-2962 Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Now Come the plaintiffs by and through their attorneys, Hash & Hash, and for cause of action against the defendant, allege:

I

This action is brought under the Federal Tort Claims Act, 28 USC Sec. 1346(b), 2671 et seq. as hereinafter more fully appears. Plaintiffs are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

II

That on or about the 18th day of October, 1956, during the nighttime of said date, plaintiff was siding as a passenger in a Piper Tri-Pacer airplane, owned and primarily operated by Glenn A. Price, near Sky Harbor Airport, County of Maricopa, City of Phoenix, State of Arizona.

III

That at the time and place aforesaid, the said pilot, Glenn A. Price, was in radio communication with operators of the control tower at the said Sky Harbor Airport and had received several messages from said tower and was following the directions issued by the said operators of the said tower. That at the time and place above mentioned, the said operators of the said tower were regularly in the service and employ of the Civil Aeronautics Administration of the defendant, The United States of America, and they were acting within the scope of their office or employment.

IV

That the said operators undertook to assist the said pilot, Glenn A. Price, to make a safe landing, and having so undertaken, acted in a careless and negligent manner, in that the said operators directed the said pilot, Glenn A. Price, by radio communication, to change his course several times, and that the said operators by failing to notice that said pilot was in imminent danger of crashing, were careless and negligent in not directing the said pilot in a proper manner.

V

That because of the careless and negligent conduct of the said operators, the pilot, Glenn A. Price, was misled and deceived into landing the aircraft short of the runway, all as a direct result of following instructions issued by the aforesaid tower operators, and resulting in injuries and damages as hereinafter specifically set out.

VI

That as a direct result of the aforesaid negligent and careless conduct and course of action of the defendant and its agents and servants, plaintiff suffered severe injuries which caused him to be hospitalized and from which he suffered great pain of mind and body, all to his damage in the sum of Fifty Thousand Dollars ($50,000.00).

VII

That as a direct result of the aforesaid negligent and careless acts of the defendant and its servants and agents, plaintiff was forced to seek medical and hospital attention and care, all to his damage in the sum of Three Thousand Dollars ($3,000.00).

VIII

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff lost many days work from his employment, all to his damage in the sum of Five Thousand Dollars ($5,000.00).

Wherefore plaintiffs and each of them pray judgment against the defendant as follows:

1. For damages in the sum of Fifty Thousand Dollars ($50,000.00);

2. For medical and hospital attention and care in the sum of Three Thousand Dollars ($3,000.00);

3. For loss of employment in the sum of Five Thousand Dollars ($5,000.00); for their costs herein incurred, and for such other and further relief as is just and proper in the premises.

HASH & HASH

/s/ EDGAR HASH,

Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 14, 1958.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Now Come the plaintiffs by and through their attorneys, Hash & Hash, and for cause of action against the defendant, allege:

I

This action is brought under the Federal Tort Claims Act, 28 USC Sec. 1346(b), 2671 et seq. as hereinafter more fully appears. Plaintiffs are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

II

That on or about the 18th day of October, 1956, during the nighttime of said date, plaintiff, William Carl Cunningham, was riding as a passenger in a Piper Tri-Pacer airplane, owned and primarily operated by Glenn A. Price, near Sky Harbor Airport, County of Maricopa, City of Phoenix, State of Arizona.

III

That at the time and place aforementioned, the said pilot, Glenn A. Price, was in radio communication with operators of the control tower at the said Sky Harbor Airport and had received several messages from said tower and was following the directions issued by the said operators of the said tower. That at the time and place above mentioned, the said operators of the said tower were regularly in the service and employ of the Civil Aeronautics Administration of the defendant, The United States of America, and they were acting within the scope of their office or employment.

IV

That the said operators undertook to assist the said pilot, Glenn A. Price, to make a safe landing, and having so undertaken, acted in a careless and negligent manner, in that the said operators directed the said pilot, Glenn A. Price, by radio communication, to change his course several times, and that the said operators by failing to notice that said pilot was in imminent danger of crashing, were careless and negligent in not directing the said pilot in a proper manner.

V

That because of the careless and negligent conduct of the said operators, the pilot, Glenn A. Price, was misled and deceived into landing the aircraft short of the runway, all as a direct result of following instructions issued by the aforesaid tower operators, and resulting in injuries and damages as hereinafter specifically set out.

VI

That as a direct result of the aforesaid negligent and careless conduct and course of action of the defendant and its agents and servants, plaintiff, William Carl Cunningham, suffered severe injuries which caused him to be hospitalized and from which he suffered great pain of mind and body, all to his damage in the sum of Fifty Thousand Dollars ($50,000.00).

VII

That as a direct result of the aforesaid negligent and careless acts of the defendant and its servants and agents, plaintiff, William Carl Cunningham, was forced to seek medical and hospital attention and care,

all to his damage in the sum of Three Thousand Dollars ($3,000.00).

VIII

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff, William Carl Cunningham, lost many days work from his employment, all to his damage in the sum of Five Thousand Dollars ($5,000.00).

Wherefore plaintiffs pray judgment against the defendant as follows:

1. For damages in the sum of Fifty Thousand Dollars ($50,000.00);

2. For medical and hospital attention and care in the sum of Three ThousandDollars ($3,000.00);

3. For loss of employment in the sum of Five Thousand Dollars ($5,000.00); for their costs herein incurred, and for such other and further relief as is just and proper in the premises.

HASH & HASH
/s/ By EDGAR HASH,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 29, 1958.

In the United States District Court
for the District of Arizona

No. Civ-2963 Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Now Come the plaintiffs by and through their attorneys, Hash & Hash, and for cause of action against the defendant, allege:

I

This action is brought under the Federal Tort Claims Act, 28 USC Sec. 1346(b), 2671 et seq. as hereinafter more fully appears. Plaintiffs are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

II

That on or about the 18th day of October, 1956, during the nighttime of said date, plaintiff, Glenn A. Price, was flying a Piper Tri-Pacer airplane, owned by plaintiff, near Sky Harbor Airport in the County of Maricopa, City of Phoenix, Arizona, and was attempting to land said aircraft on the aforesaid airfield.

That plaintiff had left El Paso, Texas on a flight to Phoenix, Arizona. That upon approaching Phoenix, Arizona, plaintiff called the control tower at Sky Harbor Airport, Phoenix, by radio, and requested landing instructions. That the operators of the Civil Aeronautics Administration Control Tower at Sky Harbor Airport, Phoenix, Arizona then issued radio instructions to plaintiff, directing him to the airport. That plaintiff told the tower operators he could not see Sky Harbor Airport.

III

That at the time and place aforementioned, the plaintiff was in radio communication with operators of the control tower at the said Sky Harbor Airport and had received several messages from said tower and was following the directions issued by the said operators of the said tower. That at the time and place above mentioned, the said operators of the said tower were regularly in the service and employ of the Civil Aeronautics Administration of the defendant, The United States of America, and they were acting within the scope of their office or employment.

IV

That the said operators undertook to assist the plaintiff to make a safe landing, and having so undertaken, acted in a careless and negligent manner, in that the said operators directed the plaintiff, by radio communication, to change his course several times, and that the

said operators, by failing to notice that plaintiff was in imminent danger of crashing, were careless and negligent in not directing plaintiff in a proper manner.

V

That because of the careless and negligent conduct of the said operators, the plaintiff was misled and deceived into landing the aircraft short of the runway, all as a direct result of following instructions issued by the aforesaid tower operators, and resulting in injuries and damages as hereinafter specifically set out.

VI

That as a direct result of the aforesaid negligent and careless conduct and course of action of defendant and its agents and servants, the plaintiff's airplane was destroyed, to his damage in the sum of Seven Thousand Five Hundred Dollars ($7,500.00).

VII

That as a direct result of the aforesaid negligent and careless acts of the defendant, plaintiff was severely injured in and about his body, including a broken rib and broken jaw, and has been forced to undergo plastic surgery and other medical and hospital care, all to his damage in the sum of One Thousand Dollars ($1,000.00).

VIII

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff lost many days from

his employment, all to his damage in the sum of Six Thousand Dollars ($6,000.00).

IX

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff has suffered great suffering and pain of body and mind, to his damage in the sum of Ten Thousand Dollars ($10,000.00).

Wherefore plaintiff prays judgment against the defendant as follows:

1. For destruction of plaintiff's airplane in the sum of Seven Thousand Five Hundred Dollars ($7,500.00);

2. For medical and hospital care in the sum of One Thousand Dollars ($1,000.00);

3. For loss of employment in the sum of Six Thousand Dollars ($6,000.00);

4. For damages in the sum of Ten Thousand Dollars ($10,000.00); for his costs herein incurred, and for such other and further relief as is just and proper in the premises.

HASH & HASH
/s/ By EDGAR HASH,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 14, 1958.

In the United States District Court
For the District of Arizona

No. Civ. 2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER OF DEFENDANT UNITED STATES OF AMERICA

Comes Now, the Defendant, United States of America, and for its answer to Plaintiffs' Amended Complaint alleges, denies and admits as follows:

I

Defendand admits the first sentence, paragraph numbered I of Plaintiffs' Complaint.

II

Defendant denies each and every other allegation in the Plaintiffs' Complaint for it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraphs II through VIII, and the last two sentences of Paragraph I.

First Defense

The Complaint fails to state a claim against the Defendant upon which relief can be granted.

Second Defense

The damages alleged in the Complaint were proximately caused or contributed to by the negligence and carelessness of the Plaintiffs.

Third Defense

The damages alleged in the Complaint were the result of an unavoidable accident.

Fourth Defense

The so-called negligent acts alleged by the Plaintiffs in their Complaint constitute acts within the discretionary function or duty exception of the Federal Tort Claims Act, (28 U.S.C., Section 2680(a)), and as such is an improper claim over which this Court lacks jurisdiction.

Fifth Defense

The Plaintiffs assumed the risk of the alleged airplane crash, set out in the Complaint, by flying, and by flying in the nighttime, with an unqualified pilot.

Wherefore, Defendant demands judgment.

JACK D. H. HAYS,
United States Attorney,
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney

Receipt of a copy of the foregoing Answer acknowledge this 30th day of December, 1958.

HASH & HASH,
/s/ By VIRGINIA HASH,
Attorneys for the Defendants.

[Endorsed]: Filed Dec. 30, 1958.

In the United States District Court
For the District of Arizona

No. Civ. 2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER OF DEFENDANT UNITED STATES OF AMERICA

Comes Now, the Defendant, United States of America, and for its answer to Plaintiffs' Complaint alleges, denies and admits as follows:

I

Defendant admits the first sentence, paragraph numbered I of Plaintiffs' Complaint.

II

Defendant denies each and every other allegation in the Plaintiffs' Complaint for it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragrahps II through IX, and the last sentence of Paragraph I.

First Defense

The Complaint fails to state a claim against the Defendant upon which relief can be granted.

Second Defense

The damages alleged in the Complaint were proximately caused or contributed to by the negligence and carelessness of the Plaintiffs.

Third Defense

The damages alleged in the Complaint were the result of an unavoidable accident.

Fourth Defense

The so-called negligent acts alleged by the Plaintiffs in their Complaint constitute acts within the discretionary function or duty exception of the Federal Tort Claims Act, (28 U.S.C., Section 2680(a)), and as such is an improper claim over which this Court lacks jurisdiction.

Fifth Defense

The Plaintiffs assumed the risk of the alleged airplane crash, set out in the Complaint, by flying and by flying in the nighttime.

Wherefore, Defendant demands judgment.

JACK H. HAYS,
United States Attorney
/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney.

Receipt of a copy of the foregoing Answer acknowledged this 15th day of December, 1958.

HASH & HASH,
Attorneys for the Defendants.
/s/ By VIRGINIA HASH

[Endorsed]: Filed Dec. 15, 1958.

In the United States District Court
For the District of Arizona

No. Civ. 2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION TO CONSOLIDATE FOR TRIAL AND NOTICE

(Rule 42 F.R.C.P.)

Defendant moves the Court to consolidate for trial the above entitled action with Glenn A. Price and Jane Doe Price, husband and wife, No. Civ. 2963-Phx., United States District Court for the reasons that each cases involves common questions of law and fact, and that a consolidation of these cases for trial will avoid unnecessary costs and delay, all as provided in Rule 42(a), F.R.C.P.

This Motion is based upon the affidavit attached hereto.

HACK H. HAYS,
United States Attorney.
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney

NOTICE

TO: Hash & Hash
Attorneys at Law
412 Arizona Savings Building
Phoenix, Arizona

Please Take Notice that Defendant will cause the foregoing Motion to be heard before the United States District Court, Federal Court House, Phoenix, Arizona, on January 12, 1959 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel for the Defendant may be heard.

Dated this 31st day of December, 1958.

JACK D. H. HAYS,
United States Attorney,
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 31, 1958.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Monday, January 19, 1959, at Phoenix Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix
Civ-2963 Phoenix

Plaintiffs' Motion to Set for Trial and Plaintiffs' Motion to Consolidate Civ-2962 Phoenix with Civ-2963 Phoenix for trial are called for hearing this day. Edgar Hash, Esq. appears for the plaintiff. Wm. Eubank, Esq., Assistant United States Attorney, is present for the Government.

It Is Ordered that cases Nos. Civ-2962 and Civ-2963 Phx. are set for trial Tuesday, October 6, 1959 at 10:00 o'clock a.m., and that said cases be consolidated for trial.

In the United States District Court
For the District of Arizona

(Consolidated for Trial)

No. Civ-2963-Phx

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs.

vs.

THE UNITED STATES OF AMERICA,

Defendant.

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs.

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DEPOSITION UPON ORAL EXAMINATION OF THOMAS J. McINTYRE, D.D.S.

Seattle, Washington
August 7, 1959
Carl A. Gibson
Court Reporter
Tacoma, Washington

In the United States District Court for the District of Arizona.

Glenn A. Price and Jane Doe Price, husband and wife, Plaintiffs, Hash & Hash; by Virginia Hash, and

Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistant U. S. Attorney, Attorney for Defendant.

William Carl Cunningham and Vera Mae Cunningham, husband and wife, Plaintiffs, Hash & Hash; by Virginia Hash, and Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistant U. S. Attorney, Attorney for Defendant.

No. Civ-2963-Phx and No. Civ-2962-Phx.

Deposition upon Oral Examination of Thomas J. McIntyre, D.D.S. [1]*

Be It Remembered, that pursuant to an oral stipulation by and between counsel and on Friday, August 7, 1959, at the hour of 1:45 o'clock P.M., at Room 403, Stimson Building, Seattle, Washington, before me, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, Washington, personally appeared Dr. Thomas J. McIntyre, a witness herein, produced as a witness at the instance of the Plaintiffs, having been first duly sworn, was thereupon examined and interrogated as a witness in the above-said cause.

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*Page number appearing at bottom of Original Deposition.

The parties being represented by their respective attorneys as follows:

Virginia Hash, Attorney at Law, of the Phoenix, Arizona Law Firm of Hash & Hash, and Robert M. Reynolds, Attorney at Law, of the Tacoma, Washington Law Firm of Metzger, Blair & Gardner, appeared on behalf of the Plaintiffs.

John S. Obenour, Attorney at Law, and Assistant United States Attorney, appeared on behalf of the Defendant.

Whereupon, the following proceedings were had and testimony taken, to wit:

Mr. Reynolds: Let the record show that this deposition is being taken pursuant to the [2] same stipulations as was the prior deposition of Dr. Ramaker.

DR. THOMAS J. McINTYRE

having been first duly sworn upon oath, was called as a witness at the instance of the Plaintiffs and testified as follows:

Direct Examination

By Miss Hash:

Q. Would you state your full name, Doctor?

A. Thomas J. McIntyre.

Q. And would you tell us your occupation, please?

A. Oral Surgeon.

Q. And would you tell us some of your background as far as your education and training is concerned?

A. Yes. I graduated from Northwestern University with a Bachelor of Science degree and a degree in Oral Surgery in 1948. I spent one year at the King

(Deposition of Dr. Thomas J. McIntyre.)

County Hospital in Seattle, and I spent three years in the Navy, one year at the Bremerton Navy Hospital.

Q. As a dentist?

A. Yes, as an oral surgeon, and I have been continuously in Seattle since 1951.

Q. Have you taken any specialized courses in your profession? [3]

A. Oh, routine annual refresher courses which usually are given through the universities and they last over a period of two weeks to a month.

Q. Are you acquainted with a man by the name of Glenn A. Price? A. I am.

Q. When did you first become acquainted with Mr. Price?

A. I first saw Mr. Price on the 25th of October, 1956.

Q. Was that as a patient of yours? A. Yes.

Q. And did you examine him at that time?

A. I did.

Q. And what did you find from your examination?

A. Well, Mr. Price was referred to me from the neuro-surgeon who treated him apparently in Arizona following an alleged accident in an aircraft there. He was referred from the neuro-surgeon in Arizona to the Virginia Mason Clinic who in turn referred him to me for post-operative care following this fractured jaw he sustained in Arizona. When I saw him he had facial lacerations and inter-oral lacerations, and subsequent X-rays showed a sub-condylar fracture.

Q. Would you describe for us, please, where you found the lacerations?

(Deposition of Dr. Thomas J. McIntyre.)

A. I don't have a record on the external lacerations. The [4] inter-oral lacerations were referred to the retro-molar area.

Q. Now, translating that into laymen's language, Doctor, can you tell us what you mean by "retro-molar"? A. Behind the back teeth.

Q. All right. A. The lower back teeth.

Q. Would that be on both sides of the jaw?

A. Yes.

Q. All right. And what else did you find?

A. He also, as I mentioned, had a sub-condylar fracture with minimal displacement below the left mandible condyle.

Q. It was on the left side that he had the fracture?

A. According to my records and according to the films I have, that would be correct.

Q. You are now examining some X-ray films?

A. I am.

Q. Did you take those X-ray films?

A. No, he was referred to Dr. Homer Hartzell in this (Stimson) building for suitable X-rays.

Q. You referred him to Dr. Hartzell?

A. I referred him for these, yes, for the X-rays.

Q. You have those X-rays in your possession at this time, Doctor?

A. Yes, they are dated 10-25-56. [5]

Q. Now, in examining the X-rays, were they all taken from the same point of view?

A. No. There are three different views, four different views, excuse me; a posterior-anterior view, right and left oblique views, and a Waters' view to obviate

(Deposition of Dr. Thomas J. McIntyre.)
any fractures of the upper jaw as well as the bilateral temporal mandibular joint.

Mr. Obenour: Let the record show that we object to the doctor testifying from the X-rays for the reason that they were taken by Dr. Hartzell rather than by the doctor.

The Witness: I beg your pardon?

Mr. Reynolds: That is all right, Doctor. He is putting his objection in to the record. You don't have to pay any attention to it.

By Miss Hash:

Q. Now,—(interrupted)

Mr. Obenour: (Interrupting) The objection will also go to the testimony as to the contents of the X-rays themselves.

Miss Hash: All right.

By Miss Hash: [6]

Q. From your examination of Mr. Price then did you undertake to treat Mr. Price for his fractured mandible?

A. Well, this type of fracture is one that responds very nicely to conservative treatment inasmuch as there was no displacement. And the treatment for a subcondylar fracture usually is more involved than the problem itself. Inasmuch as there was no displacement we felt the best thing to do would be to have full new dentures constructed for him to maintain a normal relationship between his upper and lower jaw. He was referred to Dr. Ramaker for that purpose.

Q. How many times did you see Mr. Price in your office? A. I saw Mr. Price four times.

(Deposition of Dr. Thomas J. McIntyre.)

Q. Four times?

A. Yes, over a period from the 25th of October to the 27th of November of '56.

Q. That was before he acquired the new dentures?

A. No, I saw him the last visit. After I had seen him he had his new dentures.

Q. All right. Now, back to the first time he came in, did you give him any treatment at that time in addition to having the X-rays made?

A. We removed the sutures from the lacerations.

Q. Could you tell us how many sutures were removed? A. I have no record. [7]

Q. And the second time that you saw him, what treatment did you give him?

A. Purely observation.

Q. Was there any further care that you gave him at that time? A. No.

Q. Was there any further care that you gave him at any subsequent visit?

A. No. No, we gave him no further definitive care.

Q. All right. Now, Doctor, what was your charge to Mr. Price for the care that you gave?

A. Our total charge was $35.00.

Q. And has that charge been paid?

A. Yes, that was paid on 2-21-57.

Q. By Mr. Price?

A. Apparently. I have no record. All I know is that it was paid.

Q. Have you seen Mr. Price since?

A. I have no record of having seen him since.

(Deposition of Dr. Thomas J. McIntyre.)

Q. Could you determine from your examination what caused the lacerations in Mr. Price's mouth?

A. No, not precisely. Certainly the lacerations he sustained would be consistent with the type of accident that he described. As I remember, he told me that he was wearing his dentures at the time of the accident and that they were shattered by the impact. The lacer-[8] ations he had in his mouth would be consistent with that type of injury.

Q. That is from the dentures breaking; is that correct? A. Yes.

Q. In other words then, he had his teeth removed at some time prior to the accident and was wearing dentures? A. Yes.

Q. There were no signs of any teeth having been recently removed from his mouth?

A. Well, it depends on what you mean by "recently". I would say certainly that within the last six months, no.

Miss Hash: That is all.

Mr. Reynolds: Do you have any questions, Mr. Obenour?

Cross-Examination

By Mr. Obenour:

Q. What do you mean by "displacement"?

A. Relative to a fracture?

Q. Yes?

A. Well, of course when a bone is fractured and if there is any break in the continuity of the bone, then that is referred to as a displacement. In other words, if there is any break in the continuity of the bone and it

(Deposition of Dr. Thomas J. McIntyre.)

[9] is fragmented somewhat apart, that is referred to as a displacement.

Q. But there was no displacement in this instance?

A. Minimal displacement.

Q. So that the characteristics, the facial characteristics, had not been affected by this fracture from your observation?

A. No, I have no really definite record on that, but I would certainly be surprised if, from this type of fracture, he did have any facial derangements. I don't remember any certainly.

Q. The only treatment you gave him was consistent with the removal of the sutures? A. Right.

Q. What was the purpose for which the sutures had been placed?

A. Well, there again, of course, I would have to rely on the information supplied me, which was that he sustained lacerations.

Q. The sutures were for the lacerations rather than any work done upon the fracture? A. Yes.

Q. Was there by any type of a mechanical device to retain the mouth by reason of the fracture, or was it simply healing without any type of braces or anything of that sort? [10]

A. I have no record that he had any appliances. As I remember, he was wearing no appliance when I saw him. He may have been wearing a head cap which frequently people do, which is a very simple appliance and requires no type of fixation.

Q. A cap—,what?

A. Well, actually it's primarily a sling. It consists

(Deposition of Dr. Thomas J. McIntyre.)

of a piece of muslin cloth which goes over the top of the crown of the head and then is attached by some type of suspension, either a rubber band or string or new shoe laces, and it is a sling that goes under the jaw, which gives support.

Q. You don't recall or don't know whether in fact he had such a sling?

A. I really don't remember.

Q. But other than that possibility, there was no other appliance that was used? A. No.

Q. And the injury then, in your treatment, was from the lacerations which you were told was from other dentures?

A. Well, the inter-oral ones, as I understand it, were from the dentures which he told me shattered at the time of the accident. The ones on his face he told me he sustained when he hit whatever he hit inside the aircraft.

Q. So then the restoration of the dentures, from your [11] observation and treatment, would be that his mouth would be in the same condition as it was prior to the dentures being replaced?

A. Well, there again, of course, it takes six to eight weeks for a fracture of this type to heal on an average. I saw him exactly a month after his accident, so he still had a two or three week period of grace following the time I saw him in the insertion of his dentures for that fracture to have slipped. And whether or not it did, I have no idea.

Q. I see.

A. I would assume that if he had any difficulty, he

(Deposition of Dr. Thomas J. McIntyre.)

would have contacted me because that was the stipulation that we had. At any rate, I stopped seeing him.

Q. So the installation of new dentures would have restored his mouth to the condition it was prior to the injury?

A. That usually is what happens in these cases.

Mr. Obenour: I believe that is all.

Miss Hash: That is all.

Mr. Reynolds: Doctor, thank you very kindly.

(Whereupon, the witness was excused.) [12]

Certificate

State of Washington, County of Pierce—ss.

I, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, in said County and State do hereby certify:

That the annexed and foregoing deposition upon oral examination of the witness, Dr. Thomas J. McIntyre, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting by me; said deposition being taken in Room 403, Stimson Building, Seattle, Washington, on Friday, August 7, 1959.

I further certify that the said witness and the parties hereto waived the reading and signing by said witness of his testimony after same was fully transcribed.

I further certify that all objections made at the time of said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said oral examination.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any [13] such attorney or counsel, and that I am not financially interested in said action, or the outcome thereof.

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth and nothing but the truth.

I further certify that said deposition upon oral examination is a full, true and correct transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 13th day of August, A. D. 1959.

/s/ CARL A. GIBSON,
Notary Public in and for the
State of Washington, residing
at Tacoma.

[Seal]

My commission expires May 23, 1960. [14]

[Endorsed]: Filed Aug. 17, 1959.

In the United States District Court
For the District of Arizona

(Consolidated for Trial)

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife.

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DEPOSITION UPON ORAL EXAMINATION OF RAY EDWARD RAMAKER, D.D.S.

Seattle, Washington
August 7, 1959
Carl A. Gibson
Court Reporter
Tacoma, Washington

In the United States District Court for the District of Arizona.

(Consolidated for Trial.)

Glenn A. Price and Jane Doe Price, husband and wife, Plaintiffs, Hash & Hash; by Virginia Hash, and

Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistnat U. S. Attorney, Attorney for Defendant.

William Carl Cunningham and Vera Mae Cunningham, husband and wife, Plaintiffs, Hash & Hash; by Virginia Hash, and Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistant U. S. Attorney, Attorney for Defendant.

DEPOSITION UPON ORAL EXAMINATION OF RAY EDWARD RAMAKER, D.D.S. [1]

Be It Remembered, that pursuant to an oral stipulation by and between counsel and on Friday, August 7, 1959, at the hour of 1:15 o'clock P.M., at Room 403, Stimson Building, Seattle, Washington, before me, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, Washington, personally appeared Dr. Ray Edward Ramaker, a witness herein, produced as a witness at the instance of the Plaintiffs, having been first duly sworn, was thereupon examined and interrogated as a witness in the above-said cause.

The parties being represented by their respective attorneys as follows:

Virginia Hash, Attorney at Law, of the Phoenix, Arizona Law Firm of Hash & Hash, and Robert M. Reynolds, Attorney at Law, of the Tacoma, Washington Law Firm of Metzger, Blair & Gardner, appeared on behalf of the Plaintiffs.

John S. Obenour, Attorney at Law, and Assistant United States Attorney, appeared on behalf of the Defendant.

Whereupon, the following proceedings were had and testimony taken, to wit:

Miss Hash: Let the record show that there are two cases in this matter and that [2] originally they were filed as two separate cases, one being designated as Civil No. 2962-Phoenix, Cunningham versus U.S.A., and one Civil No. 2963-Phoenix, Price versus U. S., and they have been consolidated for trial.

Mr. Reynolds: Mr. Obenour, do you think we should take any stipulation with regard to the time and place of taking this deposition?

Mr. Obenour: It is agreeable with me, whatever you want.

Mr. Reynolds: Well, all right, let the record show in addition that the notice of time and place is waived by Attorney for the Government, Mr. Obenour, and Miss Hash and myself as the two attorneys for the Plaintiff.

Miss Hash: I think we should further stipulate at this time, if it is agreeable to you two gentlemen, that the taking of the deposition will be recessed until a later time to permit the doctor's subsequent examination.

Mr. Reynolds: All right. [3]

Mr. Obenour: That is agreeable.

Miss Hash: Off the record a minute.

(Whereupon, a discussion was had off the record.)

Mr. Reynolds: This deposition is to be used at the time of trial so the normal procedures shall be followed, and the original of the deposition will be mailed to the Clerk of the Court in Phoenix, Arizona.

DR. RAY EDWARD RAMAKER,

having been first duly sworn upon oath, was called as a witness at the instance of the Plaintiffs, and testified as follows:

Direct Examination

By Miss Hash:

Q. Would you state your full name, please, Doctor? A. Ray Edward Ramaker.

Q. And what is your occupation?

A. Dentist.

Q. You are, I take it, licensed to practice dentistry in the State of Washington? A. I am.

Q. Are you licensed in any other States? [4]

A. Yes, Minnesota and Montana.

Q. Would you tell us something about your educational background and your specialty, if you have any?

A. Well, I graduated from highschool. Do you want to know when? Well, that was in 1911. I went to normal business school for two years and business Dentistry in the University of Minnesota during a part college also from 1912 to 1913, and to the School of of '13, '14 and '15, when I graduated. I taught there for two years.

(Deposition of Dr. Ray Edward Ramaker.)

Q. What did you teach, Doctor?

A. Prosthetics. That is denture work. I was in the Army then for 26 months. I don't know the dates. I was discharged and went out to Montana in '19.

Q. Excuse me just a moment. Did you practice dentistry in the Army? A. Yes.

Q. And did you have a rank?

A. 1st Lieutenant.

Q. Thank you, go ahead.

A. I practiced in Hobson, Montana, for about four years, and then I went to Missoula and practiced there for about five years, and then moved here. Then I started my specialty out here.

Q. You specialized in only dentures?

A. That is right. [5]

Q. And have you had any specialized training in addition to what you have already told us?

A. Oh, yes. I went back to the University of Minnesota on two different occasions and took up postgraduate work back there. And then I have taken study courses out here, two of them.

Q. And you have practiced, then, right here in Seattle ever since that time?

A. About 18 years.

Q. Now, do you know a man by the name of Glenn A. Price? A. Yes.

Q. When did you first become acquainted with Mr. Price?

A. December 10th, 1956.

Q. And what was the occasion for your acquaintance with him?

(Deposition of Dr. Ray Edward Ramaker.)

A. He was referred to me by Dr. McIntyre for dentures.

Q. And did he come to you then for his dentures?

A. Yes.

Q. Would you tell us what your treatment was of Mr. Price?

A. Well, now, actually it was a similar procedure that you do on any of the denture work. He was in here five times while we were doing the impression work. Also, I examined the X-rays the day that he came down here. I went up to the office and seen them and I noticed the fractures. I have forgotten what they were now, and we simply went [6] through the usual procedure with the impression work. I did caution him at that time that until his mandible closes will be necessary for him to have a complete set of upper and lower dentures in a few years.

Q. Now, when you first examined him, Doctor, did you discover the fracture in his jaw?

A. No, only to the extent that the sutures had been removed just shortly before, and I knew from that that surgery had been done.

Q. You could tell that sutures had been removed?

A. Oh, yes.

Q. From what portion of his jaw?

A. Oh, now, there you go. I couldn't tell you exactly now, I'm sorry.

Q. Do you recall—(interrupted)

A. (Interrupting) Dr. McIntyre would know that for sure.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Do you recall which side the jaw was fractured on?

A. Both sides. Am I wrong on that? I have forgotten. I get so many of these things, I don't recall unless I have the actual X-rays in my office.

Q. Did you take the X-rays yourself?

A. No, they were taken by Dr. Hartzell.

Q. Was that at the direction of Dr. McIntyre?

A. That is right.

Q. Dr. McIntyre had caused the X-rays to be taken? [7] A. That is right.

Q. And did you notice anything else in his mouth or jaw at that time besides the removal of the sutures?

A. All I can actually remember at that time is that in palpating the mouth I was able to discern that the gums were swollen at one or two points, but as to that, I cannot be sure.

By Mr. Reynolds:

Q. What would that indicate?

A. Well, simply inflamation from the injury and that it was not a full closure of the bone as yet.

By Miss Hash:

Q. Did you fit him with dentures at that time?

A. Yes, he received the dentures on the 20th of December, '56, ten days later.

Q. And is it a proper practice to fit a person with dentures when there is not a complete closureof the bone?

A. It is better, yes, because they act or if there is no particular pressure placed there, why, there is a sort of a split there. I don't know, the healing is better,

(Deposition of Dr. Ray Edward Ramaker.)

but if it is open,—no, I mean if there is a big space there, we wouldn't do that.

Q. There was, then, no big space?

A. Not that I saw. [8]

Q. Now, you stated that he, in any event, would probably have to have another set of dentures?

A. Yes.

Q. Would you explain that?

A. Well, in normal fractures of the mandible, as the closure takes place, it is somewhat similar to adhesion tissue after a tonsilectomy. There is a pulling in of the jaw, and very frequently as the jaw heals it causes a contraction of the mandible on the other side, which diminishes it in actual size as it does that. Whatever dentures are resting in there then fails to come together with the upper denture. It is changing the shape and it is turning back.

Q. Does that cause any difficulty in the use of the mouth? A. Yes.

Q. Would you tell us what that difficulty is?

A. Well, it's just not—at first he probably wouldn't know that at all for a year, a year and a half or maybe two years, and that is simply that the biting surface is partially obliterated by the incorrect position of the cusps of the teeth.

Q. Would a condition of that kind cause pain or suffering?

A. I doubt if it causes any particular pain, but he gets some awful sore spots on the lower denture.

Q. In other words, sore spots on his gum? [9]

A. Yes.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Can that condition be corrected?

A. It can by relieving him of his lower dentures for possibly a week and then start on a new impression.

Q. Making new dentures? A. Yes.

Q. Both uppers and lowers?

A. Yes, you have to. The lower teeth are set forward, you see.

Q. I see.

A. Now, Doctor, would you tell us what the cost has been to Mr. Price for your care?

A. Yes, I charged him $250.00. I didn't know whether they were going to make any kind of a deal on this insurance, so I made him a little discount of $8.00 on it. He paid me $242.00.

Q. And that is the total bill to date; is that correct? A. Yes, all paid.

Q. All right. Now, it is your intention to see Mr. Price again to determine whether or not he has this difficulty that you were speaking of?

A. If it is necessary, yes. He is coming in—he didn't say when—but he told me he was coming in.

Miss Hash: I have no further questions.

Mr. Reynolds: Do you have any questions, Mr. [10] Obenour?

Cross-Examination

By Mr. Obenour:

Q. You were paid by Mr. Price?

A. Yes, in two checks. He gave me one on the 10th and another one on the 20th.

Q. You were paid by him? A. Yes.

(Deposition of Dr. Ray Edward Ramaker.)

Q. What was his occupation?

Mr. Reynolds: This is off the record.

(Whereupon, a discussion was had off the record.)

By Mr. Obenour:

Q. Your work has been restricted to the preparation of dentures then, Doctor, rather than a general practice of dentistry?

A. Yes. I do no general practice at all.

Q. And you did no work for Mr. Price in the treatment for any injuries? A. No, sir.

Q. Strictly the preparation of the dentures?

A. Yes, sir.

Q. From your examination of his mouth, were you able to [11] tell whether or not he had previously worn dentures? A. I do not recall.

Q. Do you recall the condition of his mouth at the time you first examined him on December the 10th?

A. To some extent, yes, sir.

Q. Now, you say that there were indications that sutures had been removed; was that the sutures that would be attendant on the removal of teeth or would that be sutures that were removed as a result of the accident?

A. That was a surgical procedure from the accident.

Q. A surgical procedure for what, could you tell?

A. For the fracture of the mandible.

Q. How did you know that there was a fracture of the mandible?

A. He told me. Then I got one of the X-rays and looked at it.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Your information was from what you were told by Mr. Price and from the examination of the X-rays taken at Dr. McIntyre's instigation?

A. Yes, that is right.

Q. And you do not recall what those fractures were?

A. I do not exactly, no, sir, I'm sorry.

Q. Now, when you referred to or I believe you said that there were two sore spots in the mouth, was that restricted to the fractures? [12]

A. Yes, I believe it was because I know or I remember just vaguely about it, but when I palpated the lower mouth I found tenderness there in two places where the tissue was elevated somewhat and that was partially on the fracture or at least it was against the sutures.

Q. Had it been required for the teeth to be removed, would the mouth not have shown whether or not there had been teeth removed or whether it was a mouth that had worn dentures previously?

A. Some extractions had been made previously. I don't recall.

Q. But it would show?

A. There is another thing there, sutures would pretty well cover up the source of extraction. You see, where the sutures were, that may have been the result of the operative interference to correct that mandible. It could have been that, I just don't know. I know I didn't see any wire in the mandible as though they had wired it together at that time on either side. No X-rays showed that at all.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Your experience then with Mr. Price has been restricted to the post-accident period exclusively?

A. Yes, sir.

Q. Now, if he in fact had worn dentures prior to the accident, the only damage to the teeth would be that involved [13] with the replacement of those dentures; would that be correct, as contrasted to the loss of any other teeth or anything of that sort?

A. Well, from what you are asking, all I know is that I can't give you anything except I saw the edentulous mouth. What he had prior to that, I do not know.

Q. And so that the treatment that you gave him was the preparation of dentures at a time when the jaw was still in a healing process?

A. It would be so, yes.

Q. And in your opinion, that is the proper procedure to fit for dentures? A. By all means.

Q. When you say "closure" do you mean the closure of the bone or the closure of the gums?

A. Well, in part, the closure of the bone as due to the healing process. It brings the two severed parties together. Now, the other answer would be, closure normally in denture work indicates a closure between the upper and lower jaw.

Q. I see.

A. If you have a long time with the lower teeth or the upper teeth out, you get a closure or, I mean, your jaw comes together mostly like this (indicating and demonstrating). [14]

Q. You speak of a closure then, just to make sure that I understood you, when there is a closure, that is

(Deposition of Dr. Ray Edward Ramaker.)

involved in the bite rather than in the bones of the jaw? A. No, the bone at that time.

Q. The bones at that time?

A. Yes. No, this was the bones at that time, or I should say the bone.

Q. And at this time you are unable to say what would be the degree of change in the bite from the time that you first saw him and fitted him with dentures to the present time?

A. No, it's the same thing.

Q. I mean,—(interrupted)

A. (Interrupting) Well, there's a pattern there all right.

Q. A pattern such as a matter of knowing that you can anticipate other than fitting the actual teeth? Is there a difference that you can say? What is the actual change that we would be referring to?

A. There is a pattern there all right on this other closure that I mentioned. I know or I mean in fact that the jaw has closed. I mean the mandible condyles have gone up.

Q. And that is the change then? A. Yes.

Q. Is that of the bite and the closure of the jaws? [15]

A. That is right.

Q. So that the biting surface of the teeth are changed? A. That is right. Well, yes.

Q. Would that change his appearance?

A. Oh, yes, it would.

Q. To what degree?

A. Well, if you left this absolutely alone—you see, I haven't seen this man recently, I'm guessing.

(Deposition of Dr. Ray Edward Ramaker.)

Q. All right, sir.

A. I am stating what he told me on the telephone.

Q. Well, rather than guessing, you are going to see him again, are you not?

A. Yes. With the lower jaw and if there is a closure and that mandible comes out, I can only express it in this way. Everyone of you people have seen men and women my age and you see them on the street and they look like they are very sulky. The jaw sits way out like that (indicating and demonstrating), you see what I mean?

By Miss Hash:

Q. It caused his lower jaw to stick out forward; is that right, Doctor?

A. Yes. That is the biggest contention that we have in dentistry today, and that is the closure.

By Mr. Obenour: [16]

Q. What would be the effect of the additional dentures then?

A. Well, the only thing you can do now that he has got a complete healing process is that he certainly should have new dentures made. They should last him for many, many years.

Q. What effect will the new dentures then have on his appearance. A. It should improve it.

Q. Will the new dentures correct the bite?

A. It would have to.

Q. Then it would return to what it would normally be?

A. It won't return to exact normal, no, sir. It simply sets the teeth in a position to effect a normal biting.

(Deposition of Dr. Ray Edward Ramaker.)

Mr. Obenour: I don't have anything else now until after the continuation.

Miss Hash: I think that is all until the continuation.

(Whereupon, the witness was excused.) [17]

Certificate

State of Washington, County of Pierce—ss.

I, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, in said County and State, do hereby certify:

That the annexed and foregoing deposition upon oral examination of the witness, Dr. Ray Edward Ramaker, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting by me; said deposition being taken in Room 403, Stimson Building, Seattle, Washington, on Friday, August 7, 1959.

I further certify that the said witness and the parties hereto waived the reading and signing by said witness of his testimony after same was fully transcribed.

I further certify that all objections made at the time of said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said oral examination.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney [18] or counsel, and that I am not financially interested in said action, or the outcome thereof.

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth and nothing but the truth.

I further certify that said deposition upon oral examination is a full, true and correct transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 13th day of August, A. D. 1959.

[Seal]

/s/ CARL A. GIBSON,
Notary Public in and for the State of Washington, residing at Tacoma.

My commission expires May 23, 1960. [19]

[Endorsed]: Filed Aug. 17, 1959.

In the United States District Court
For the District of Arizona

No. Civ. 2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REQUEST FOR ANSWERS
TO INTERROGATORIES

To the above-named Plaintiffs, Glenn A. Price and Jane Doe Price, husband and wife, c/o Messrs. Hash & Hash, Attorneys at Law, 412 Arizona Savings Building, Phoenix, Arizona:

You Are Hereby Notified to answer under oath the interrogatories numbered from 1 to 17, inclusive, as set out hereafter, within fifteen (15) days of the time service is made upon you in accordance with Rule 33 of the Federal Rules of Civil Procedure.

Interrogatory No. 1

State the residence address of plaintiffs Glenn A. Price and Jane Doe Price (hereinafter addressed directly or as Plaintiffs) (a) at the present time; (b) at the time of the commencement of the action; (c) at the time of the accident; (d) for three years immediately preceding the accident.

Interrogatory No. 2

State in detail each and every injury claimed to have been sustained by the Plaintiffs as a result of the accident alleged in the Complaint.

Interrogatory No. 3

As to each and every injury referred to in answer to question 2, state (a) the duration of the symptoms resulting therefrom; (b) the nature and extent of any disability resulting therefrom; (c) whether or not any disability is permanent in nature, and if so, in what respect such injury is claimed to be permanently disabling and to what extent.

Interrogatory No. 4

Were Plaintiffs confined to a hospital as a result of the alleged injuries, and if so, give the name and address of the hospital and the duration of the confinement.

Interrogatory No. 5

Were Plaintiffs confined to bed at home as a result of the alleged injuries, and if so, give the beginning and ending dates of such confinement.

Interrogatory No. 6

Were Plaintiffs confined to their home for any period as a result of the alleged injuries, and if so, give the dates of commencement and termination of such confinement.

Interrogatory No. 7

Did Plaintiffs visit any doctors as a result of the alleged injuries, and if so, give the name and address of each doctor visited, the dates of each visit to each doctor, the nature of the treatment given by each doctor on each visit, the diagnosis and prognosis of each doctor, and the charges of each doctor, showing in detail how the total was computed.

Interrogatory No. 8

If Plaintiffs were confined to a hospital, state the amount of the hospital charges.

Interrogatory No. 9

List each and every item of special damage which Plaintiffs claim resulted from their injuries herein, and as to any special damages consisting of payments to persons such as nurses, housekeepers, etc. for services, give the name and address of each such person and the dates of services.

Interrogatory No. 10

Were Plaintiffs employed at the time of the accident?

Interrogatory No. 11

If the answer to the preceding question is yes, state the name and address of Plaintiffs' employers, the length of time employed, the nature of Plaintiffs' duties, and salary and other income received by Plaintiffs per week, and if such salary includes overtime, and amount of such salary attributable to such overtime.

Interrogatory No. 12

If Plaintiffs were employed at the time of the accident, give the name and address of each employer of the Plaintiffs for the five years immediately preceding the accident, the nature of the work done during that period, and the salary received.

Interrogatory No. 13

If Plaintiffs were employed at the time of the accident did they file federal income tax returns for each of the five years immediately preceding the accident, and

if so, state with which District Director's office said returns were filed.

Interrogatory No. 14

If Plaintiffs were employed at the time of the accident, were they required to absent themselves from their employment for any period of time as a result of the accident, and if so, state the length of time they remained away from their employment, and whether or not they received any compensation from their employers during that period.

Interrogatory No. 15

(a) Name the airports at which you either took off or landed, or both, on October 18, 1956, prior to your arrival in the vicinity of Phoenix, Arizona.

(b) State all such take-off and landing times and the time of your first transmission to the airport traffic control tower at the Phoenix Sky Harbor Municipal Airport (hereinafter referred to as the Phoenix Airport).

Interrogatory No. 16

(a) Has any civil or criminal action been instituted against you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties instituting such action or actions, the court or courts involved, and the results.

Interrogatory No. 17

(a) Other than the instant case, has any civil action been instituted by you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties against which such action or actions were instituted, the court or courts involved, and the results.

Dated: September 10, 1959.

JACK D. H. HAYS,
United States Attorney
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney

Two copies of the above and foregoing Request for Answers to Interrogatories received this 10 day of September, 1959.

HASH & HASH
/s/ By EDGAR HASH,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 10, 1959.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES

Come Now the Plaintiffs above named and, for answer to the Defendant's Interrogatories heretofore served upon them, state as follows:

Interrogatory No. 1

The answer to Interrogatory No. 1 is as follows: The residence address of the Plaintiffs, Glenn A. Price and

his wife is, and since before October, 1953, has been Vashon Island, King County, Washington.

Interrogatory No. 2

In answer to Interrogatory No. 2 Plaintiff has attached to these answers to Defendant's Interrogatories copies of letters from Doctor Stovall of the Orthopedic Clinic, Phoenix, Arizona and Doctor Robert L. Maresca of Phoenix, Arizona, detailing injuries received in the accident and treated at Phoenix, and the medical treatment thereof. In addition to the injuries therein alleged, Plaintiff states that in the accident two pairs of spectacles owned by him were broken, and a lower plate of dentures were broken. Plaintiff was also treated on his return to his home on Burton, Vashon Island, Washington, by Doctor McIntyre and Doctor Ramaker of Seattle, Washington. Plaintiff further states that his attorney has informed him that depositions of both of these physicians have been completed, at which deposition an attorney for the Government, Mr. Obenour, was present, in which further treatment of Plaintiff's injuries as above stated was discussed in detail. In brief summary the Plaintiff states that the fracture of his mandible was treated by the making of new dentures by Dr. Ramaker, but as a result thereof there was a closure of Plaintiff's lower jaw resulting in the present necessity for one and possibly two additional sets of dentures at a cost of from $250.00 to $350.00; that said closure, which was the proximate

result of the broken mandible caused by the accident, has resulted in the impairment of his hearing; that although the making and fitting of new dentures will arrest the impairment of said hearing, such impairment as has occurred will be permanent. The letters from Dr. Stovall and Dr. Maresca attached hereto, and the testimony of Drs. McIntrye and Ramaker from their depositions are included herein and made a part hereof to the same extent as though set forth at length herein.

Interrogatory No. 3

Reference is hereby made to the documents and depositions referred to in Plaintiff's answer to Interrogatory No. 2, which are a made a part hereof to the same extent as though set forth at length herein. More parrticularly:

(a) In addition to the times indicated in the attachments hereto and the depositions hereinabove referred to, Plaintiff states that the fractures of the third, fourth and the fifth right ribs anteriorly, referred to in the letter of Dr. Stovall attached hereto, rendered Plaintiff unable to engage in any extensive physical activity because of the soreness of said ribs.

(b) Plaintiff states that, as set forth in the deposition of Dr. Ramaker, his hearing has been impaired as a result of said accident.

(c) That said impairment of hearing, referred to hereinabove in subparagraph (b), is permanent in nature.

Interrogatory No. 4

Plaintiff states that he was confined to the Memorial Hospital in Phoenixk from October 18, 1956, until October 22nd, 1956.

Interrogatory No. 5

Plaintiff, Glenn A. Price, was not confined to bed at home as a result of the above alleged injuries.

Interrogatory No. 6

Plaintiff, Glenn A. Price, states that while he was not confined to his home as a result of said accident, as stated hereinabove, his physical activities were severely impaired because of soreness of his rib cage due to the fractures of the third, fourth and fifth right ribs anteriorly, above referred to, for approximately one month from the occurrence of the accident, or until November 18, 1956.

Interrogatory No. 7

Reference is made to the letters attached hereto for details of services of doctors Stovall and Maresca, in Phoenix, Arizona, and to the depositions referred to hereinabove for the number of visits and treatment by Drs. McIntyre and Ramaker, in Seattle, Washington. In addition, Plaintiff, Glenn A. Price, obtained replacements for the two pair of spectacles which were broken in the accident from Dr. Darboe in Tacoma, Washington. For diagnosis and prognosis of each doctor, with the exception of Dr. Darboe, reference is made to the letters attached hereto from Drs. Stovall and Mar-

esca and to the depositions of Drs. McIntyre and Ramaker. The charges of said physicians are summarized as follows:

Dr. Stovall, (Orthopedic Clinic Phoenix, Arizona)	$ 45.00
Dr. Maresca	100.00
Dr. McIntyre, Seattle, Wash.	35.00
Dr. Darboe, Tacoma, Wash. (New spectacles)	108.38
Dr. Ramaker, Seattle, Wash. (New dentures)	242.00
Total	$530.38
Dr. Ramaker—Estimated charges of necessary new denture to be incurred in the future	250.00—350.00
Grand total	$780.38—880.38

Interrogatory No. 8

The amount of the hospital charges paid by Glenn A. Price for his confinement at Memorial Hospital in Phoenix were $221.40.

Interrogatory No. 9

In addition to the above, special damages claimed by Plaintiff, Glenn A. Price, are as follows:

Ambulance Service in Phoenix, Arizona	15.00
Paid to Phoenix Aviation, Phoenix, Arizona, for care and storage of the aircraft	140.00
Value of Plaintiff's aircraft, a Piper Tri-Pacer, which was a complete loss	9.000.00
Total	$9,155.00

Interrogatories Nos. 10 through 14

Plaintiff, Glenn A. Price, was self-employed at the date of the accident, and makes no claim herein for loss of wages or profits.

Interrogatory No. 15

Plaintiff's itinerary on the day of the accident, to-wit, October 18, 1956, was as follows:

Left San Angelo, Texas, at 10:07 a.m.; arrived Wink, Texas, at 11:37 a.m.;

Left Wink, Texas, at 12:40 p.m.; arrived El Paso, Texas, at 2:10 p.m.;

Left El Paso, Texas, at 3:07 p.m.

Interrogatory No. 16

A civil action was instituted against Plaintiff in early 1957 by Tovrea Land & Cattle Co., for damages to cattle pens and cattle caused by the accident. Title of the case: "Tovrea Land & Cattle Co., Plaintiff vs. Glenn Price, Defendant," Cause No. 91799 of the Superior Court of the State of Arizona, in and for the County of Maricopa. Plaintiff herein, Glenn Price, defendant therein, filed an answer and counterclaim to the complaint in said action; the action was compromised and settled and dismissed in April, 1958. This was the only civil or criminal action instituted against Plaintiff, Glenn A. Price as a result of said accident.

Interrogatory No. 17

Other than the answer and cross-complaint referred to in the answer to Interrogatory No. 16 hereinabove,

no civil action has been instituted by me in connection with this accident.

/s/ GLENN A. PRICE

Subscribed and sworn to before me this 24th day of September 1959.

[Seal] /s/ C. H. NORSTROM.
Notary Public in and for the State of Washington, residing at Vashon.

The Orthopedic Clinic
2620 North Third Street
Phoenix, Arizona.

May 29, 1957

Virginia Hash, Attorney at Law
Mayer-Heard Building
Phoenix, Arizona.
Re: Glen A. Price

Dear Miss Hash:

Mr. Glen A. Price of Burton, Washington, has requested that write you concerning injuries he sustained on October 18, 1956, when he was in an airplane crash.

The patient was originally examined by me in the emergency room at Memorial Hospital at approximately 7:30 p.m., October 18, 1956. History obtained from the patient was that at about 6:30 p.m., October 18, 1956, he was in the process of making an approach landing to the Sky Harbor Airport when he mistook the

lights of the Tovrea Stockyards for the runway and before realizing his mistake, he was unable to raise the plane and the airplane crashed into the Stockyards.

In the accident the patient sustained the following injuries:

1. Laceration of the left upper eyelid near the medical side.
2. Laceration of the left mandibular area.
3. Contusion of right mid clavicular area.
4. Fractures of the 3rd, 4th and 5th right ribs anteriorly.
5. Small abrasion, 1/4 inch in diameter over the left leg below the knee.
6. Multiple abrasions and contusions of the hands and left forearm.
7. Fracture of the mandibular rami.

At the time of my examination, the patient's condition was considered to be good. Dr. Robert Maresca was called concerning the fractured mandible as well as the lacerations about the head. For Dr. Maresca's findings, suggest that you contact his office.

The patient was admitted to Memorial Hospital where he remained until October 22, 1956. While in the hospital, his fractured ribs were treated by means of a chest binder and he made progressive improvement and at the time of discharge he was advised to seek further medical attention on his return to his home in Burton, Washington.

Since being discharged from the hospital, the patient has not been re-examined by me and I am in no posi-

tion to state if there was any permanent disability present; however, none was expected.

I trust that this is the desired information and if I can be of further service, call upon me.

Yours very truly,

/s/ SIDNEY L. STOVALL, M.D.

SLS:mb

Robert L. Maresca, M.D.
2021 North Central Avenue
Phoenix, Arizona.

June 3, 1957

Miss Virginia Hash, Attorney at Law
Mayer-Heard Building
Phoenix, Arizona.

Dear Miss Hash:

I have been requested to furnish you with a statement at the time I was attending Mr. Glenn A. Price at Memorial Hospital.

I was requested to see Mr. Price by Dr. Sidney Stovall the evening of October 18, 1956 within about 90 minutes after his accidental landing in the stockyards. He was in a state of mild shock, (Blood pressure 100-70, pulse 120). When examined by me, he was found to have the following injuries:

1- a fracture of the left condyle of the mandible.

2- a through and through laceration of the left cheek about 2 inches long.

3- a hockey stick shaped through and through laceration of the left mentum about 2½ inches long,

4- a laceration of the left eyebrow and eyelid down to, but not through the lid margin,

5- a laceration inside the mouth extending from the lower right lateral incisor area around the anterior surface of the mandible to the area of the second lower left molar tooth. This tissue was found to be almost completely avulsed from the mandible surface.

There had been a minimal blood loss.

I repaired these lacerations. The care of the contused rib cage was done by Dr. Sidney Stovall. There was a small laceration on the dorsum of the left middle finger.

My charge for this work was $100.00.

Yours very truly,

/s/ R. L. MARESCA, M.D.

RLM-sf

Duly Verified.

[Endorsed]: Filed Oct. 2, 1959.

In the United States District Court
For the District of Arizona

No. Civ. 2962-PHX.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REQUEST FOR ANSWERS TO INTERROGATORIES

To the above-named Plaintiffs, William Carl Cunningham and Vera Mae Cunningham, husband and wife. c/o Messrs. Hash & Hash, Attorneys at Law, 412 Arizona Savings Building, Phoenix, Arizona.

You Are Hereby Notified to answer under oath the interrogatories numbered from 1 to 17, inclusive, as set out hereafter, within fifteen (15) days of the time service is made upon you in accordance with Rule 33 of the Federal Rules of Civil Procedure.

Interrogatory No. 1:

State the residence address of plaintiffs William Carl Cunningham and Vera Mae Cunningham (hereinafter addressed directly or as Plaintiffs) (a) at the present time; (b) at the time of the commencement of the action; (c) at the time of the accident; (d) for three years immediately preceding the accident.

Interrogatory No. 2:

State in detail each and every injury claimed to have been sustained by the Plaintiffs as a result of the accident alleged in the Complaint.

Interrogatory No. 3:

As to each and every injury referred to in answer to question 2, state (a) the duration of the symptoms resulting therefrom; (b) the nature and extent of any disability resulting therefrom; (c) whether or not any disability is permanent in nature, and if so, in what respect such injury is claimed to be permanently disabling and to what extent.

Interrogatory No. 4:

Were Plaintiffs confined to a hospital as a result of the alleged injuries, and if so, give the name and address of the hospital and the duration of the confinement.

Interrogatory No. 5:

Were Plaintiffs confined to bed at home as a result of the alleged injuries, and if so, give the begining and ending dates of such confinement.

Interrogatory No. 6:

Were Plaintiffs confined to their home for any period as a result of the alleged injuries, and if so, give the dates of commencement and termination of such confinement.

Interrogatory No. 7:

Did Plaintiffs visit any doctors as a result of the alleged injuries, and if so, give the name and address of each doctor visited, the dates of each visit to each

doctor, the nature of the treatment given by each doctor on each visit, the diagnosis and prognosis of each doctor, and the charges of each doctor, showing in detail how the total was computed.

Interrogatory No. 8:

If Plaintiffs were confined to a hospital, state the amount of the hospital charges.

Interrogatory No. 9:

List each and every item of special damage which Plaintiffs claim resulted from their injuries herein, and as to any special damages consisting of payments to persons such as nurses, housekeepers, etc. for services, give the name and address of each such person and the dates of services.

Interrogatory No. 10:

Where Plaintiffs employed at the time of the accident?

Interrogatory No. 11:

If the answer to the preceding question is yes, state the name and address of Plaintiffs' employers, the length of time employed, the nature of Plaintiffs' duties, and salary and other income received by Plaintiffs per week, and if such salary includes overtime, and amount of such salary attributable to such overtime.

Interrogatory No. 12:

If Plaintiffs were employed at the time of the accident, give the name and address of each employer of the Plaintiffs for the five years immediately preceding the accident, the nature of the work done during that period, and the salary received.

Interrogatory No. 13:

If Plaintiffs were employed at the time of the accident, did they file federal income tax returns for each of the five years immediately preceding the accident, and if so, state with which District Director's office said returns were filed.

Interrogatory No. 14:

If Plaintiffs were employed at the time of the accident, were they required to absent themselves from their employment for any period of times as a result of the accident, and if so, state the length of time they remained away from their employment, and whether or not they received any compensation from their employers during that period.

Interrogatory No. 15:

(a) Name the airports at which you either took off or landed, or both, on October 18, 1956, prior to your arrival in the vicinity of Phoenix, Arizona.

(b) State all such take-off and landing times and the time of your first transmission to the airport traffic control tower at the Phoenix Sky Harbor Municipal Airport (hereinafter referred to as the Phoenix Airport).

Interrogatory No. 16:

(a) Has any civil or criminal action been instituted against you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties insituting such action or actions, the court or courts involved, and the results.

Interrogatory No. 17:

(a) Other than the instant case, has any civil action been instituted by you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties against which such action or actions were instituted, the court or courts involved, and the results.

Dated: September 10, 1959.

JACK D. H. HAYS,
United States Attorney.
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney.

Two copies of the above and foregoing Request for Answers to Interrogatories received this 10 day of September, 1959.

HASH & HASH.
/s/ By EDGAR HASH,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 10, 1959.

In the District Court of The United States
For the District of Arizona

Civ.-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE,
Plaintiffs,

vs.

UNITED STATES of AMERICA,
Defendant.

DEPOSITION OF BERNARD JOHN OSWALD

Deposition of Bernard John Oswald, a witness of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein Glenn A. Price and Jane Doe Price are the plaintiffs and United States of America is the defendant, pending in the District Court of the United States for the District of Arizona pursuant to subpoena before Gerald J. Popelka, Notary Public in and for the State of Washington residing at Tacoma, commencing at 10:00 o'clock a.m., Wednesday, September 30, 1959, at the United States Courthouse, Tacoma, Washington.

Appearances: On behalf of the Plaintiffs: Mr. Robert M. Reynolds, Attorney at law, Tacoma Building, Tacoma, Washington.

On behalf of the Defendant: Mr. John S. Obenour, Assistant U.S. Attorney, Federal Building, Tacoma, Washington. [1] *

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*Page number appearing at top of Original Deposition.

It was stipulated by counsel that all objections other than as to the form of the question or responsiveness of the answer be reserved until the time of trial.

It was further stipulated by the witness and counsel that the signature of the witness to the deposition be waived.

The following proceedings were then had, to wit:

Mr. Reynolds: I think the record should show that insofar as is necessary to do so, representing the plaintiffs we will waive notice of time and place of the taking of depositions even though we think that the U.S. Attorney in Phoenix was a little bit tardy in getting the thing started.

I think the record should also show that while I occasionally represent Mr. Oswald, my firm, on this particular occasion I am appearing as attorney for the plaintiffs, Glenn A. Price and William C. Cunningham, and not as attorney for Mr. Oswald. [2]

BERNARD JOHN OSWALD,

called as a witness on behalf of the defendant, being first duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Obenour:

Q. Will you state your full name?

A. Bernard John Oswald.

Q. And where do you live, Mr. Oswald?

A. 809 Princeton Street.

Q. Your occupation?

A. You can call it a flight—airport and flight operator.

(Deposition of Bernard John Oswald.)

Q. Airport operator?

A. And flying service operator.

Q. And are you also and instructor? A. Yes.

Q. How long have you operated an airport?

A. I operated an airport at Cle Elum, Washington, from possibly January of 1942 to June of '43. Then we started our operation on the present Tacoma Airport in the first part of 1946.

Q. And it would be January or February of 1946 you have continued to operate the Tacoma Airport?

A. The Tacoma Airport, yes. It was actually the—right at the end of the war we began to operate commercially about the first of the year. There was—the airport [3] was under construction the latter part of '45.

Q. What is the name of the airport?

A. Tacoma Airport, Incorporated.

Q. And is it also known by your name?

A. The Oswald Flying Service operates the flying service, and I also serve as airport manager. We have the airport leased.

Q. And you have the airport leased? How do you mean?

A. The airport is a separate corporation, Tacoma Airport, Incorporated, and I operate the Oswald Flying Service as an individual, and I have a lease for the use of the airport with Tacoma Airport, Incorporated.

Q. Do you have an interest in the Tacoma Airport, Incorporated?

A. Yes. I am the president of the corporation.

(Deposition of Bernard John Oswald.)

Q. Now, you operate the airport, or are you manager of the airport itself?

A. Yes. I am listed with the Federal Aviation Agency as airport manager.

Q. And how long have you served as airport manager?

A. Since it was originally built. Since the first part of 1946.

Q. And what was your position in Cle Elum at the airport?

A. We had the airport at Cle Elum listed from the City of Cle Elum, a municipal airport, and I served as manager [4] and flight operator there.

Q. What do you mean by flying service?

A. Well, the flying service is the actual facility that furnishes services to the flying public, gas, oil, and servicing and maintenance and repairs and flight instruction and charter flights and things like that.

Q. Do you have airplanes for charter there?

A. Yes.

Q. Do you manage this charter service of the airplanes?

A. That is part of our operation, a small part of our operation. I manage the over-all operation of all the facilities we have to offer.

Q. Do you manage all of the operation of the Oswald Flying Service? A. That is right.

Q. How long have you done that?

A. Well, actually, the Oswald Flying Service was originally started way back in 1937, but there have been interruptions. There was interruptions during the war.

(Deposition of Bernard John Oswald.)

But I have been at the present location since—actually you might say we began our operation approximately October of 1945 and brought the first airplane in there.

Q. When did you begin flying yourself?

A. 1933. [5]

Q. What was your flight experience from 1933 to date?

A. I have approximately ten thousand hours of flying time.

Q. What was your occupation from 1933 until you began the Oswald Flying Service in '37?

A. I was a truck driver up at Beacon's Moving and Storage Company.

Q. What was the nature of your training?

A. Well—

Q. How did you obtain your flight training?

A. I was enrolled as a student at the—originally at the old Tacoma Field before it became McChord Air Force Base, and then I transferred, actually, over to the Mueller-Harkins Airport, which is out right across the street from the Mountain View Cemetery, and I finished my training and made my solo flight there. I believe they called that Washington Air College at that time.

Q. You obtained your flight training on your own, then, rather than being in some service, military service?

A. That is right. All my flight training was under civilian direction.

Q. And from 1933 to 1937 was flying your profession, or was it more for your personal pleasure?

A. That is right. It was more for my personal pleasure and learning training at the same time. [6]

(Deposition of Bernard John Oswald.)

Q. Now, in 1937 you began your Oswald Flying Service? A. That is right.

Q. And from 1937 on was flying your profession?

A. Well, it was partially so. I had this old airplane and used it in barnstorming, hauling—carrying passengers and so forth. Actually, I began to—in the meantime I obtained what they called at that time a transport pilot's license, and I began doing some instructing—actual student training in '39. I worked for the operator—did some work for the operator there.

Q. Now, you began instructing in 1939. That was on a civilian basis? A. That's right.

Q. How long have you served as an instructor?

A. Since approximately 1939.

Q. What has been your experience as an instructor?

A. Well, I have been working at flight training practically all that time except during the period when I was flying for Boeing Aircraft, and I would estimate I have possibly five to six thousand hours of actual instruction time given to aviation students.

Q. Has that all been on a civilian basis?

A. Actually none of it was purely military. During the war we had this contract with the CAA for war [7] training service, a flight training program. They were actually military students flying in the Reserve status.

Q. Was that C.P.T.?

A. Well, it was C.P.T. just before the war, and I was engaged in that for a short time as an instructor working for the operator at the Mueller-Harkins Airport. But then I had my own contract when they called

(Deposition of Bernard John Oswald.)

it the War Training Service. After the war started, they changed it over to War Training Service.

Q. Where was that?

A. That was at Cle Elum.

Q. What service were you instructing?

A. It was for the Air Force.

Q. It was for the Army Air Force?

A. For the Air Force. Some were glider pilots. They were getting training as glider pilots, and some of them went in for instructors. It was a varied program.

Q. Was that a pre-primary training or was that a program that included varying degrees of experience?

A. We just had the primary phase, the first forty to fifty hours, and they went to other schools from our place.

Q. How long did you serve in this capacity as instructor?

A. It was just one winter, I believe. We started that program approximately in September of '42 and it was [8] terminated in May of '43. We just went through the one winter, as I remember, on that, and they began to cancel those contracts out.

Q. And after that did you continue to serve as flight instructor?

A. No. Then I went to work flying at Boeings in July—I believe it was July of '43.

Q. What capacity?

A. As a production test pilot.

Q. And you were flying what then?

A. B-17's and B-29's.

Q. How long did you continue in that capacity?

(Deposition of Bernard John Oswald.)

A. Until the end of the war. I believe it was approximately August of 1945 when we were laid off over there.

Q. And thereafter you began this operation in Tacoma? A. That is right.

Q. And from the end of 1945, approximately, to date you have then continued, as I understand it, to have an interest in the ownership of the Tacoma flying field to manage the airport itself under the Oswald Flying Service, and also to give flight instructions, is that right, sir?

A. That is correct, with the exception that my interest in the airport—financial interest in the airport was fairly minor at the beginning. I helped in the [9] organization and construction of the airport, but over the period of years I have become more financially interested in the airport itself.

Q. And you have actually, though, been in control of and operating the actual flight facilities at the airport since 1945 to date, is that right?

A. That is right.

Q. What is the nature of the flight instructions you have given since 1945?

A. It has all been civilian instruction up to those primer flying—up to and including multi-engine ratings and instrument ratings. Principally in light aircraft.

Q. Who controls flying in the United States?

Mr. Reynolds: That is objected to as calling for a legal conclusion.

Go ahead, Mr. Oswald, you may answer.

(Deposition of Bernard John Oswald.)

A. The Civil Aeronautics Administration, actually, and now the Federal Aviation Agency.

By Mr. Obenour:

Q. Would you describe the control by the CAA, as it was known then, and the FAA as it is now known as, over the qualifications of pilots? Shall I break that down?

A. Yes. It is pretty complicated. [10]

Q. Well, what is required under Federal regulations in order to operate an aircraft?

A. Before a student can make his solo flight—

Q. (Interposing) First of all—excuse me—is there a system of licensing controlled by the CAA, now the FAA?

A. Yes.

Q. And what are the different licenses that the CCA and FAA issue?

A. They start out with a student pilot certificate. They don't call them licenses, they call them certificates now, and a—they call them a student pilot certificate, private pilot certificate, commercial pilot certificate, and then there is a number of ratings denoting their skill that accompany these certificates.

Q. What are these various ratings?

A. They call them single-engine land ratings, single engine and multi-engine land ratings, and a single-engine sea and a multi-engine sea rating.

Q. "Sea" being water?

Mr. Reynolds: Sea (spelling).

A. Yes. Flight instructor ratings and instrument ratings, and airline transport ratings. [11]

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. Are there ratings for night flight?

A. No. The only requirement for day and night flying is that the pilot must have—how is that rating—he must have had five take-offs and landings within the last ninety days at a period one hour after sunset before he can carry any passengers on a night flight.

Q. What are the limitations upon the operations under these different certificates?

A. The single-engine land—do you mean under the different ratings?

Q. Under the different certificates.

A. Well, under the different certificates a private pilot's certificate allows the holder to engage purely in private flying any place that he wants—any place that he wants to go and is permitted to go. But he cannot engage commercially in the sense that he would accept any money for his services as a pilot.

Q. He is qualified, however, to take passengers with him, is he not?

A. That is right.

Mr. Reynolds: This is a private—

Mr. Obenour: Yes, a private certificate.

By Mr. Obenour:

Q. What are the limitations on a student certificate? [12]

A. A student certificate may not carry any passengers other than his flight instructor, and he is not permitted to leave the area of his home operating base on any of his solo flights until he is qualified and checked out by his flight instructor.

(Deposition of Bernard John Oswald.)

Q. And the commercial rating, that is as the name implies? A. Yes.

Q. He can engage in flying for commercial purposes?

A. That is right. He can earn his living at flying?

Q. Now, who evaluates the qualifications of a pilot in order to grant or deny these certificates?

A. Actually the CAA, or the FAA, inspectors are the prime examiners. The thing is in their charge, but they do have other designated flight examiners who are not employees of the FAA who can give flight tests by permission form an FAA inspector.

Q. Do you serve in that capacity?

A. Not at the present time.

Q. Have you?

A. Yes. I was a private pilot examiner quite a mumber of years ago.

Q. How are the flight instructors controlled by the FAA or the CAA?

A. The flight instructors have to—they have to take a very rigid written and flight examination given directly [13] by the FAA inspector himself.

Q. Do you have such a certificate?

A. Yes.

Q. How long have you had such a certificate?

A. I believe since 1939.

Q. In your flight training what part does the flight instructor play in evaluation of the qualifications of a student pilot towards obtaining a private certificate?

(Deposition of Bernard John Oswald.)

A. Well, all of the students training is under the direct supervision of his instructor. Also, the larger flight schools usually have a chief pilot who is also a flight instructor. The instructor who is giving the lessons to a particular student, unless this particular student has problems of any kind, he can refer them to the chief pilot. But normally the—practically the whole course of flight training up to and including the actual flight tests is left under the supervision of his instructor.

Q. What do you mean by flight tests?

A. That is a culmination of his training after he has had at least a minimum number of prescribed hours of flight training. Then he is eligible to take his actual flight tests either from the FAA or from his designated FAA flight examiner to prove that he is competent to carry passengers and be a safe pilot. [14]

Q. How many instructors do you have in your service?

A. Oh, at the present time we have two fulltime instructors besides myself, and we have another part-time instructor.

Q. And do you have a chief instructor or chief pilot?

A. At the present time I am serving as the chief pilot. That has only been for approximately the last three months. Before that Bob Crowthers was our chief pilot. But he has left our employ.

Q. What are the courses of instruction that you provide at the Oswald Flying Service?

(Deposition of Bernard John Oswald.)

A. We provide private and commercial flying courses and single and multi-engine land with flight instructor instrument ratings.

Q. And the only service that you do not provide, then, are transport certificates?

A. As far as I know there is no actual course towards the airline transport rating. It is something that a man has—usually has a lot of experience gathered through the years before he makes—he has to make his application directly to the FAA for that rating.

Q. Then everything, though, that goes to make up this flight experience of the instrument ratings, flight instructor ratings, and so forth, are all provided by your service?

A. They are available. In order to get to even be eligible [15] for the airline transport rating, I believe they have to have fifteen hundred solo hours. So they would have to be actually employed at aviation for quite a while as a co-pilot or other types of flying before they would even be eligible to apply for that. So it is more a matter of experience and not so much as training. It couldn't really be given on any flight course.

Q. And if I understand it, then, your total time is ten thousand hours?

A. I am estimating that. I haven't kept any accurate records of my flying time since the end of the war. I had approximately six thousand hours at the end of the war, and just estimating that, I have approximately that number of hours now.

Q. About five thousand of that has been instructor time?

(Deposition of Bernard John Oswald.)

A. Roughly. I would say between five and six thousand.

Q. And in the course of this five or six thousand hours instructor time are you regularly called upon to evaluate the students for whom you are providing instructions as to the qualifications of the students?

A. Not regularly because most of our operation out there—we have another instructor designated as chief pilot who handles that duty.

Q. However, in instructing are you called upon regularly [16] to evaluate your students in the various stages of instruction in passing them on to more advanced stages?

A. I haven't performed that duty for a good number of years. That, again, was the function of the chief pilot, and there were no—it really wasn't a duty of his. The chief pilot is required just to make check flights a certain times to analyze the progress of the student.

Q. Do you grade your students in your flight instructions? A. Yes.

Q. And in grading them is that not evaluating the progress of the students as he goes through the stages?

A. It wouldn't show his progress along in his training. It would show the—his degree of proficiency and grades on each flight lesson.

Q. An evaluation of the individual as to his proficiency in the various stages of instruction? Would that be what you are doing, instructing?

A. Well, the FAA, or CAA, tells us to grade the man according to his proficiency for the number of

(Deposition of Bernard John Oswald.)

flight hours that he has. In other words, if a man has twenty hours of flying time, he wouldn't be as good as a man with five hundred. But if his proficiency is okay at the twenty-hour period, we grade him an average grade.

Q. That calls upon you as an instructor to evaluate the [17] proficiency of your students, does it not?

A. That is right.

Q. And you do that regularly in the course of your entire instruction? A. That is right.

Q. So that in the course of your five or six thousand hours instructing, you have and regularly do evaluate the proficiency of your respective students?

A. That is right. Of course, in the olden days they didn't have records. These records that we are keeping now are more or less recent, and due to—you know, newer regulations.

Q. In olden days the records may not have been so complete, but you still did the same function in determining to your satisfaction that a student was competent within the various stages of instruction before you progressed the student, is that not correct, sir?

A. There weren't any written records kept in those days other than the—just the actual notation in the student's log book, and the grades weren't shown. Just the maneuvers performed were shown in the log book.

Q. But the instructor would be the person who would determine when he was qualified to solo or when he was qualified to progress?

A. All the responsibility is on the instructor. [18]

Q. And that means that as such you as an instructor

(Deposition of Bernard John Oswald.)

—or any instructor is called upon to evaluate the individual student in his proficiency in flight, is that right, sir?

A. Well, I wouldn't say that he is called upon to—he would make a mental evaluation as to whether the student was qualified to go out on that particular flight. But there is no written record as such.

Q. Whether there is a record written or not, the instructor necessarily has to evaluate the individual student's proficiency in all stages, does he not?

A. That is right.

Q. Now, do you know Glenn Price?

A. Yes.

Q. And how did you become acquainted with him?

A. He and his wife came to our airport and made an inquiry about taking flight instructions for himself, and we went through the usual channels of explaining what he could do, and so on, and he ended up becoming a student of our school.

Q. Did you talk to him first?

A. Yes. I happened to make the first contact with him when he came into our office.

Q. And did he take flight instruction from you then?

A. Yes. I personally gave him his flight instructions. [19]

Q. Do you have the records with—any records you maintained of his flight instruction?

A. Yes, I do. Do you want those now?

Q. Yes, please.

(Whereupon a document was handed to Mr. Obenour by the witness.)

(Deposition of Bernard John Oswald.)

Mr. Obenour: I will mark these three papers with an "A" in the upper lefthand corner of the top sheet.

By Mr. Obenour:

Q. Would you please describe what these are, Mr. Oswald?

A. The first one is a carbon copy of the school graduation certificate indicating that he had taken and passed the course as a private pilot and was eligible for the flight test—for the FAA flight test.

Q. Is that a record of your flying service?

A. It is a Civil Aeronautics form that we fill out when the student completes his course. The original goes to the —at this time it was filed with the CAA—goes to the CAA with his application for his flight test.

Q. And this would be a carbon copy, then, of the original submitted for Mr. Price to the CAA on completion of his instruction?

A. The CAA has the original of this. [20]

Q. What are the other two documents?

A. They are flight sheets which are the lessons—on which the lessons are recorded and are a duplicate of flying lessons that are put in his log book—in his pilot's log book.

Q. Who makes that up?

A. The flight instructor.

Q. Who was the flight instructor in this case?

A. It was myself in this case.

Q. Are your initials on these sheets?

A. Yes.

Q. What are the columns where your initials are?

(Deposition of Bernard John Oswald.)

A. They are—the initials are under the instructor's column.

Q. Do these two sheets show the total individual—rather—show each individual lesson given by you to Mr. Price? A. Yes.

Mr. Obenour: We offer Exhibit A.

Mr. Reynolds: May I see the exhibit, please?

Mr. Obenour: Certainly.

(Whereupon, a document was handed to Mr. Reynolds by the witness.)

Mr. Reynolds: Mr. Oswald, I note that on Exhibit A some of the initials under the [21] "instructor's initials" column, which is the fourth column from the left, are not "BJO." I assume "BJO" are your initials?

The Witness: That is right.

Mr. Reynolds: Well, who is "CLB"?

The Witness: Charles L. Bunch. He was a flight instructor working with us at that time.

Mr. Reynolds: And "CB", would that be the same man?

The Witness: Yes, sir.

Mr. Reynolds: And there is one here that looks like "CN" or just "N".

The Witness: I believe that was Charles Gross.

Mr. Reynolds: And he was another instructor?

The Witness: Yes. He was working for us at the time, and he was our—at that time he was our chief pilot.

Mr. Reynolds: And who is "CW" or "stroke" "W"?

The Witness: I haven't looked at those. I don't—

(Deposition of Bernard John Oswald.)

off hand I can't remember who that would be at that time. It would be another instructor.

Mr. Reynolds: You haven't offered that yet, have you?

Mr. Obenour: Yes, I have. I just offered it. [22]

Mr. Reynolds: Well, I will make an objection for the record on the grounds of relevancy.

By Mr. Obenour:

Q. The entry to which counsel has been referring is an entry on the second sheet, "CLB" under the date of May 29, is that right, sir?

A. Yes.

Q. That would be Mr. Bunch? A. Yes.

Mr. Reynolds: And also an entry on the first sheet.

Mr. Obenour: This is the first sheet.

Mr. Reynolds: The second page of the exhibit.

By Mr. Obenour:

Q. And then the third sheet.

A. These are schedules I probably wasn't able to meet and another instructor took him out.

Q. The fourth line from the top, "CB".

A. The same person, yes.

Q. That would be the date of June 10, '55.

A. Yes.

Q. And June 15 and June 16, "CB", June 28, "CB"

A. Yes.

Q. And July 14. A. Yes. [23]

Q. And July 25.

A. Yes. That would be Charles Gross. I recognize his handwriting.

Q. And July 28, two entries.

(Deposition of Bernard John Oswald.)

A. I can't remember who made those two. I would have to—we had at times part time instructors that were helping us out.

Q. How about August 1 and August 10?

A. That is Charles Gross again. This is where he actually—he was the designated CAA flight examiner who gave him the flight test.

Q. So the entries for 8-1 and 8-10 would be the CAA flight test?

A. Yes, private pilot test okay.

Q. All right. Those are the entries that were not your entries? A. That is right.

Q. Now, this flight training began for Mr. Price on what date, sir? A. February 22, '55.

Q. And this schedule shows the first column, the date, in the second column the airplane number, the third column is the flight time of the individual instructor or flight, is that right? A. That is right. [24]

Q. And the third is called "dual", and the fourth is "solo." Would you explain that?

A. "Dual" is when the flight instructor is in the airplane accompanying the student, and "solo" is when he is flying alone.

Q. Now, the next one is the—column five is "instructor's initials," and thereafter there are some twenty columns which I believe would describe the various stages of the flight training, is that right, sir?

A. Not stages, but various maneuvers.

Q. Maneuvers? A. That we gave him.

Q. All right, sir. And finally the column at the end appears the signatures of Mr. Price.

(Deposition of Bernard John Oswald.)

Does the student have to sign each entry after the instruction?

A. It isn't required, but we have been having them do it. We have been making a practice of it.

Q. What is the purpose for the practice of having them sign it?

A. Oh, it makes the records of our school look more complete and efficient.

Q. What are these entries that are made in these twenty columns, the figures "3's," "2's", "4's", and so forth? A. That is the grading system. [25]

Q. How are the grades given?

A. "3" is considered the average grade, and "4" is considered below average. "2" is considered better than average.

Q. What are the limits of the grades that are given?

A. "5", I believe, on the low side is considered unsatisfactory.

Q. Do you have a degree of "1"?

A. I don't believe I have ever rated that high.

Q. How about "2"?

A. I have graded "2" in some instances.

Q. What does that mean?

A. Above average.

Q. And "3" is average then? A. Yes.

Q. Now, is there a minimum time required of dual instructions before a person can solo?

A. Yes. I believe at the time that he took his training it was under a CAA approved school, which in this case it was operated, it was eight hours miminum time

(Deposition of Bernard John Oswald.)

of instruction. I believe under non-approved there is that requirement. I would have to look it up.

Q. It is a minimum of eight hours on what, sir?

A. Minimum of eight hours with the flight instructor before they are allowed to make a solo flight. [26]

Q. And who then determines when a person is qualified to solo? A. His instructor.

Q. Do you recall how much dual time Mr. Price had before he soloed?

A. No, I don't. I haven't added it up.

Q. If I add it correctly, it comes to 20 hours and 35 minutes dual time.

Mr. Reynolds: Off the record.

(Discussion off the record.)

A. There is also a five hour trip to Spokane and back that was in a four-passenger airplane which normally wasn't used for training. But he wanted that—that was all actually training, but it wasn't in a normal course of instruction that they would get. This was a trip, as I remember, to Spokane to see some relatives over there. They were permitted to put that in the record because he was actually flying the airplane. But it would make it appear that he had more time than normal before he made his solo flight.

Q. Was that four hours?

A. Four hours and fifty minutes to Spokane and return.

Q. If my addition is correct, that would make it 15 hours and 40 minutes of dual time before he soloed exclusive of that trip. [27]

(Deposition of Bernard John Oswald.)

A. That is probably pretty close.

Q. And what is the average time that students would solo in?

A. Oh, anywheres from eight to seventeen hours.

Q. And what was this instruction given in, what type of plane?

A. This was given in an Aronca, A r o n c a (spelling), Model 7AC. Though there are—I see there are two other flights too in the larger four-place Cessna, Model 170. There is another one here of 50 minutes, and another one of 40 minutes besides the Spokane trip. He made two other flights in the same airplane that he took to Spokane.

Q. Would you describe the Aronca?

A. It is a two-place training aircraft, tandem seating, and a 65 horsepower engine.

Q. Fixed-pitch prop? A. Yes.

Q. Fixed gear? A. Yes.

Q. What is meant by "fixed-pitch prop"?

A. The propeller cannot be changed in pitch by a control from the cockpit of the airplane.

Q. And how many dngine controls, then, are there in a fixed-pitch prop such as the Aronca?

A. Actually there is just your throttle.

Q. And with fixed gear, what is meant by that? [28] A. Nonretractible.

Q. So the actual controls, then, would be how many in the Aronca?

A. Do you mean the engine controls?

Q. Well, how many controls does a pilot have to master in order to fly a plane of the type as the Aronca?

A. Well—

(Deposition of Bernard John Oswald.)

Mr. Reynolds: I want to throw in an objection on the grounds of relevancy.

Mr. Obenour: I will tie it in later.

The Witness: Do you want me to answer?

Mr. Reynolds: Yes. Go ahead.

By Mr. Obenour:

Q. Yes. You may answer.

A. Well, your have your elevator and rudder and aileron controls, the wheel brakes, the throttle, the carburetor heat control, and the trim tab.

Q. Is there a carburetor control on it?

A. The carburetor heat control is an engine control.

Q. Can you cut off the carburation? How do you control the gas? A. With the throttle.

Q. How do you cut off an engine?

A. With the switch, an ignition switch.

Q. Is there any mixture control as such in that aircraft? [29]

A. No.

Q. What is meant by "supervised solo"?

A. The solo flight is under the direction and control of the instructor.

Q. Is an instructor in the ship?

A. Not on solo.

Q. How does the instructor maintain control?

A. Just through verbal instructions prior to the take-off.

Q. And this flight instruction of Mr. Price began when, sir? A. February 22 of 1955.

Q. When did he solo? A. May 3, 1955.

(Deposition of Bernard John Oswald.)

Q. Thereafter did he continue to receive flight instructions?

A. Yes. He alternated between dual and solo flight training.

Q. How long?

A. Up to what date do you mean?

Q. Yes.

A. August—well, actually July 28, 1955, was his last training flight before his actual flight test.

Q. How much instruction had he received then by July—between February of 1955 and July 28, 1955?

A. I would have to add it up on adding machine here.

Q. Do you recall that you have added it—excuse me? [30]

A. Here it is. Yes. He recieved 43 hours and 35 minutes of dual instruction and 33 hours and 40 minutes of solo flying.

Mr. Reynolds: The total?

The Witness: Total was 77 hours and 15 minutes.

Mr. Reynolds: That is the total time he received up to the granting of his private license both before and after solo?

Mr. Obenour: Yes.

The Witness: Yes.

By Mr. Obenour:

Q. What is the average instruction, dual and solo, on a—that a student would take before he would obtain his private certificate?

A. Oh, I would say anywheres from forty-five hours to eighty hours.

(Deposition of Bernard John Oswald.)

Q. Did you evaluate Mr. Price's proficiency in your instruction before he received his CAA check?

A. Yes.

Mr. Reynolds: I object to this as hearsay or irrelevant, I don't know which.

The Witness: Partially.

Mr. Reynolds: Probably both.

Mr. Obenour: We submit this man from his [31] experience as an instructor is regularly called upon to evaluate his students, and as such he is an expert in this field and qualified to give an opinion as to the individual proficiency of this man.

Mr. Reynolds: Then it is not relevant, because it is too far removed from the date of the accident.

Mr. Obenour: I believe I will tie that up also.

By Mr. Obenour:

Q. Did you form an evaluation of the proficiency of this man?

A. Partially, after my last flight with him. There was another 50-minute dual flight given to him by another instructor. He went through the private pilot flight test sequence. But as I remember, I felt at the time that the student was ready and able to pass his flight test for a private license.

Q. Do you have an opinion as to why Mr. Price would have required 77 hours and 35 minutes instruction before qualifying for a private license as compared to the average, which I believe you stated was 45 yours to 80 hours?

A. Well, there was no pressure to complete the course in [32] any special length of time, and as I say,

(Deposition of Bernard John Oswald.)

there is some other miscellaneous flying included in here that normally wouldn't be part of his—wasn't a necessary part of his flight training, which added to the total hours.

Q. Do students vary in their aptitude to flight instruction? A. Yes.

Q. What are the characteristics in the individual that would affect the aptitude of the student?

A. Well, their mental attitude and fear and ability to relax and think clearly are all factors that affect their training.

Q. Does age enter into it?

A. Somewhat from the standpoint of it slows some individuals down slightly. But they are normally more careful pilots, the older pilots.

Q. In receiving instructions does age affect their ability to respond?

A. Not necessarily. It may take a little longer for that ability to become proficient.

Q. Do persons' reactions slow down with age?

A. I think that is an accepted fact, I mean in any type of occupation that reactions slow down. That is a medical record.

Q. In your experience with instructing Mr. Price, did you [33] find that his reactions were slower by reason of his age than if he were a younger man?

A. Yes.

Q. Did that affect the amount of training that he required before he was able to receive his private flying?

(Deposition of Bernard John Oswald.)

A. I would say it did somewhat, although some people are not in a hurry to get their private certificate. They will take the attitude, "I want all the training I can possibly get so I will be a safer pilot when I do get my license."

Q. In the instance of Mr. Price, did that affect the length of his training?

A. I say it did somewhat, yes.

Q. What do you mean by "reaction time"?

A. Well, the ability to recover from—for instance, if a bad landing—it would be the quickest in period of time that it takes them to take action from, say, a bad landing or some other maneuver.

Q. Would this be a reaction to respond to an emergency?

A. Yes, I would say it would.

Mr. Reynolds: I will object to this line of questioning as irrelevant.

Mr. Obenour: We will tie it up.

By Mr. Obenour:

Q. Do you compare this to operating anything such as a car [34] or airplane when you are called upon in the operation to react to certain emergencies or changes in the operation?

A. I don't think you could compare it exactly to an automobile.

Mr. Reynolds: Objected to as leading and suggestive.

A. (Continuing) Because the training time speeds up their reactions.

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. Their what, sir?

A. The training that they get will—speeds up their reactions, the ability to recover from an abnormal position or some predicament they may be in. If you want to make it clear, the first time that a student bounced badly on a landing doesn't mean that his reactions are—his reactions may be very slow at that time. He just doesn't know what to do. But with constant bounces and contant landings, his reactions speed up.

Q. And that would be a case of experience?

A. That is right.

Q. If you were then to encounter a circumstance which you had not previously experienced where, by the same token, the reaction would be slower? [35]

A. It could be. It is an unpredictable thing.

Mr. Reynolds: That is all very speculative.

By Mr. Obenour:

Q. If a person faces an emergency in which he had not had previous experience, by that lack of experience the reaction of the individual would be slower would it not, sir?

Mr. Reynolds: Objected to as irrelevant.

A. I couldn't answer that.

By Mr. Obenour:

Q. It is just a definition of bounce-landings where you would improve by having experienced them before?

A. I have seen Boeing test pilots in an emergency make a completely wrong move in an emergency, just the opposite of what they should have done.

(Deposition of Bernard John Oswald.)

Q. So regardless of the experience, a man may respond improperly, is that right, in flying?

A. He may be, yes.

Q. Do you have a saying called "pressing the panic button" or some such thing? A. Right.

Q. And the greater the inexperience or the less the training, would that affect the reaction of the individual? In other words, the less experienced pilot would be more apt to react slower and in an improper fashion than an [36] experienced pilot, is that right, sir?

Mr. Reynolds: Speculative again.

A. I couldn't answer that because that is something you can't predict what the individual is going to do. One fellow you think, when you simulate an emergency, is going to handle—think he will handle it wrong, and he may actually do the right thing.

Q. Now, did you continue to have contact with Mr. Price after he obtained his private license?

A. Yes.

Q. And in what way?

A. He purchased his own airplane, I believe, shortly.

Q. Where? A. From a concern in Portland.

Q. What type did he purchase?

A. A Piper Tri-pacer.

Q. Would you describe that?

A. That is a four-place high-wing monoplane of 135 horsepower.

Q. How many people does it carry?

A. Four people.

Q. What type of engine and controls does it have?

(Deposition of Bernard John Oswald.)

A. It had a 135 horsepower engine, a Lycoming engine, with conventional controls. It was a tricycle gear airplane.

Q. What type of propeller? [37]

A. Fixed-pitch propeller.

Q. And landing gear is what?

A. Fixed landing gear, a tricycle gear.

Q. Does it have flaps? A. Yes.

Q. How are they operated?

A. Manually by handle.

Q. Are they multi-placed flaps or how are they controlled?

A. There are two positions—three positions, full-up, half-way position, and the maximum down position.

Q. What are the normal uses of these flaps?

A. Take-offs are normally made without flaps or with half flaps. Landings can be made with the flap in any position, and the normal position—the most used position would be full flaps for landings.

Q. What is the procedure to be followed for an emergency pull-up? First of all, do you know what I mean by "emergency pull-up"? A. Yes.

Q. To clarify, if a person were coming in for a landing and he faced an emergency which would not permit him to land, and you have to go around, what would be the procedure? A. Well, normally—

Mr. Reynolds: May I interrupt for just a [38] second. I believe the record should show in here somewhere that Mr. Obenour and myself and Mr. Oswald are private pilots, or pilots with some amount of experience, and some of the language in both the ques-

(Deposition of Bernard John Oswald.)

tions and the answers may not be quite clear. I am sure none of us have any objection if it isn't too clear at the time. Some of the terms we use are not too clear. I was thinking of your question, "pull up and go around.

Mr. Obenour: I want to go back and rephrase it. By Mr. Obenour:

Q. Where a person comes in for a landing, and, as you say, the normal flap position is full down, in the tri-pacer what would be the procedure to be followed for an emergency go around where the landing would not be able to be accomplished and where you would have to go around?

A. Well, the normal procedure would be to apply full throttle and then take off the carburetor heat, and then in pilot's terminology you would "milk-up" the flaps.

Q. Can you milk-up the flaps in a tri-pacer, or is it strictly one position or the other?

A. No, you can keep pressure on the handle and ease the [39] flaps up.

Q. Is this what you would term an emergency procedure in flying? A. Yes.

Q. What does the term "emergency procedure" mean in flying?

A. Of course, that procedure could take place without an emergency.

Q. Is it correct that the term "emergency procedure" has some special significance in flying?

A. Yes, it would be an emergency, for instance, if another aircraft got in his way, or—

Q. First of all, the term itself, "emergency pro-

(Deposition of Bernard John Oswald.)

cedure", is it not correct, sir, that it would cover special situations in flying for which a pilot must be prepared to react such as engine failure, a pull-up in landing, change of flight altitude, a stall, a spin, or something of that sort? A. Yes.

Q. And are there prescribed procedures to be followed for these respective emergencies?

A. That is right.

Q. And the procedure you described for milking up the flaps and applying power in the emergency of a go-around, that is such an emergency procedure, is it not?

A. Yes. That would be—in this case the go-around [40] procedure for this particular incident would be the same as an emergency procedure for that particular predicament.

Q. And is this a type of an emergency that would require a reaction by the pilot? A. Yes.

Q. And would the person's reaction to an emergency of a pull-up and a go-around be affected by inexperience or by slow reaction time generally?

Mr. Reynolds: Objected to as speculative and irrelevant.

Mr. Obenour: Again, we believe this man is qualified from his personal flight experience and from his flight instructing experience.

Mr. Reynolds: I am not objecting to his competency, just the relevancy, and the fact that it is a little speculative when you start talking about reaction time.

Mr. Obenour: We will tie that up also.

The Witness: Would you give me that question again now?

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. Is this emergency pull-up the type of emergency that would require a reaction by the individual pilot?

Mr. Reynolds: I think he already answered that. [41]

By Mr. Obenour:

Q. You said yes? A. Yes.

Q. Would this reaction to such an emergency be affected by a pilot's inexperience or by his generally slow reaction characteristics?

Mr. Reynolds: As I say, I think that is too speculative to demand an answer.

A. It could be affected by indecision too. In other words, the ability to make up his mind. After he once makes up his mind to do something, why, then his reaction time would depend on how quickly he performed the proper functions or operated the controls. But indecision can enter—indecision and doubt can enter into a lot of these things, from past experience of waiting too long before they decide to do these things.

Q. And have you evaluated Mr. Price's characteristics as to indecision and to his slowness to react to flight emergencies generally? A. Well—

Mr. Reynolds: Objected to as irrelevant again, because of the removal in time from the date of the accident.

A. Mr. Price was, as I remember, more on the cautious side in things, in landing in short fields which requires [42] sometimes a go-around procedure in cases where he would go around to make sure and where

(Deposition of Bernard John Oswald.)

probably it wouldn't have been completely necessary for him to do so.

Q. That would be indecision, would it not, sir?

A. It would be a decision on the cautious side.

Q. Did you evaluate Mr. Price during your flight instructions as to his being slower to react by reason of his age than the average pilot?

A. I don't—he is a very quick individual, and as I remember, when he was taught the proper thing to do, his reaction was as quick as the average person, I would say.

Q. Have you not said previously that Mr. Price being an older person his reactions would be slower?

Mr. Reynolds: Just a moment. I don't believe Mr. Oswald ever stated that. I believe he was asked a lot of questions about older people in general, but he was never asked whether those particular conclusions applied to Mr. Price or not.

Mr. Obenour: I thought that he had.

Mr. Reynolds: That is not my recollection. It may be so.

By Mr. Obenour:

Q. Did Mr. Price's age enter in his reactions, or did his age enter into the time it took before—the 77 [43] hours and 35 minutes required before he took his private flying?

Mr. Reynolds: I believe he answered that question "yes."

A. That is a very indefinite thing. We have 20-year old students that had a hard time qualifying for their private license and in more hours. Some people

(Deposition of Bernard John Oswald.)

are just naturally slow thinkers and slow to learn. But I would not say that Mr. Price was a slow learner. I think he has a very quick mind.

Q. I am talking about reactions.

A. Yes. Well, as I said before, reactions are something that in flying are trained into the person through constant repetition, and I believe it was possible that maybe it took a little more training due to his age to develop these reactions. But as I say, in thinking back over other students, why, some fellows 20 years old took as much time, if not longer, to develop their reactions too.

Q. I believe you stated, did you not, that it is recognized medically, if I recall your testimony, that the man's reactions are slower in older age?

A. That is what you read, yes.

Q. Has that been your experience too in instruction?

A. Flying is such an unpredictable thing. I believe that [44] the Air Force washes out a lot of their cadets on account of slow reactions, as you stated, to emergencies and things of that sort, and age certainly wouldn't have any bearing on that.

Q. Did you give any night instructions to Mr. Price?

A. No.

Q. Did he request it?

A. I believe on one occasion he did request some night instruction, but I was at the time quite busy, and we just took him on a—I remember we made one night flight with his airplane—in his own airplane, a short, local flight over the city, and at that particular time I

(Deposition of Bernard John Oswald.)

even flew the airplane. It was just more or less a little familiarzation. Mr. Price lived on Vashon Island and always had to catch a ferry when he was taking his training, and we never seemed to get around to that.

Q. Did you continue to be in contact with Mr. Price at the airport?

A. I would meet him and would greet him as he came out.

Q. Did he fly out of your field?

A. Yes, he kept the airplane in our hanger, and we took care of the maintenance on the airplane for him.

Q. Are you equipped for night flying at your field?

A. Yes. [45]

Q. Did he ever do any night flying?

A. Not at our field other than this one time that I went up with him.

Q. Was there any reason for that?

A. No, it just—we just never did get around to it. Some people are not particularly interested in night flying because they don't consider it safe to fly single engine airplanes at night.

Q. Do you know how many hours Mr. Price had in 19—by 1956?

Mr. Reynolds: Do you want to make that more specific?

Mr. Obenour: I am looking for the date.

Mr. Reynolds: October 18, 1956.

The Witness: No, I don't.

By Mr. Obenour:

Q. Do you know if his flying, as far as you know, other than the one flight at that time, has been out of

(Deposition of Bernard John Oswald.)

the Oswald Flying Service—or out of the Tacoma Airport?

A. No. He had made a number of other cross-country flights with his airplane.

Q. But he maintained his airplane at Tacoma flying field, did he not?

A. Tacoma Airport, yes.

Q. Now, did you discuss a proposed cross-country that Mr. Price was undertaking around October of 1956? [46]

A. Yes.

Q. And what discussion did you have with Mr. Price about this plane?

A. Well, I helped him plan his course and also in assistance with the Aircraft Owners' Association. He had written—he was a member of the Aircraft Owner and Pilot's Association and had written to them as to the best route to take on this trip, and what maps and—he requested their flight planning service in his behalf on this trip he was planning.

Q. What information was furnished to him?

A. They advised the best routes, usually in the form of a letter, and I believe they recommend what maps to use, which flight charts to use, and give him hints and warnings about mountain flying and things of that sort.

Q. I believe you stated that night—there is a rating for private flyers as to night flights?

A. An individual private pilot would not be prohibited from taking up his airplane at nighttime anytime he wanted to, but if he is going to carry any

(Deposition of Bernard John Oswald.)

passengers on those flights, he has to have five take-offs and landings made at night one hour after sunset, and that [47] is within the preceding ninety days.

Q. What are the requirements as to night flights?

A. No, there is no rating.

Q. To your knowledge had Mr. Price had such night landings? A. No.

Q. Did you discuss night flying with Mr. Price preparatory to this flight?

A. We discussed it in the sense that all of his flying should be done in the daytime.

Q. When did this conversation take place?

A. I believe on two or three occasions we went over the course and navagational facilities and so on and part of the general planning of the trip.

Q. When did this conversation take place?

A. I advised him against any night flying.

Q. What did you tell him concerning night flights?

A. I advise him against any night flying.

Q. Why?

A. For the reason that he would be over unfamiliar country and his lack of training in night flying.

Q. What is the difference between night flight and day flight?

A. There is a considerable amount of difference in being able to estimate altitudes and distances, orientation, and things of that sort.

Q. Is there any difference in landings?

A. Difference in landing, yes.

Q. What is the difference in night landing than day landing?

A. They have to learn to develop a judgment as to

(Deposition of Bernard John Oswald.)

their [48] height and position in relation to the runway.

Q. Is there any question about orientation at night with the runways themselves as distinguished from day?

A. Most people have some—have little more difficulty in lining up with the runways because it has to be done by reference to lights.

Q. Is this a matter that would require any experience or instruction in familiarzation with the manner of lighting of the runways themselves?

A. Yes, it would. Some number of people I have known do a lot of night flying but never have had any instruction whatsoever from the flight instructor on night flying. It is something they develop themselves.

Q. Is there a pattern of lighting on an airport runway at night?

A. There is different patterns.

Q. What are those—what do they consist of?

A. Some airports merely have boundary lights. Some have runway or strip lights, they call them, and some have high-intensity lights and approach lights.

Q. Do you have lights marking the ends of the runways?

A. Normally there is a prescribed pattern on municipal airports. Some of the smaller private fields will not have any particular pattern of lights on the ends of the runways. They will just have white lights all the way down. [49]

Q. Are you familiar with the airport at Phoenix?

A. I have been in and out of there for one landing and take-off in the daytime.

(Deposition of Bernard John Oswald.)

Mr. Reynolds: If I may interrupt, Mr. Obenour, I believe there are several airports in Phoenix.

I think the one we are referring to is Sky Harbor.

By Mr. Obenour:

Q. Are you familiar with the Sky Harbor Airport?

A. Yes, sir, one flight in and out of there.

Q. Are airports rated by flight manuals as to the type of lighting and so forth that they have?

A. Yes.

Q. Such things as field elevation, direction of the runways, light facilities, and things of that sort?

A. In the Airmen's Guide, yes.

Q. Was Mr. Price familiar with the Airmen's Guid

A. I am sure he was.

Q. And in the Airmen's Guide is there not a map showing each airport, each rated airport, if you want to use that term, as to the airport facilities, direction of runways, lighting facilities, and so forth?

A. There is no map. It is just a written description by code.

Q. The information is shown, is it not, for what facilities [50] at each respective airport?

A. Right.

Q. And does an airport itself have some distinctive beacon light that can be identified as to the location of the airport?

A. Yes, a rotating green and white beacon. I would say again that that is used only on the airports—well, an airport such as ours does not have a rotating beacon.

Q. Now, is there any practice that is followed in

(Deposition of Bernard John Oswald.)

flying as to coming into a strange airport at which you have never landed or are not familiar?

A. Do you mean at night?

Q. Day or night.

A. You would make normally some effort to know a little something about the airport, the radio frequencies, if they have a control tower, and the normal procedure there would be to contact the control tower anywheres from possibly five to ten miles out from the airport and get landing instructions. If there was no control tower, you would probably circle the field a little higher than the normal pattern altitude and check tl wind direction and your approaches and so forth.

Q. How do you locate yourself with an airport with which you are not familiar?

A. Usually by radio or visual aids. [51]

Q. Visual aids, what do you mean by that?

A. Well, by visual aids it would be locating the airport in relation to the—to its position on the map and its position in relation to the particular town or city.

Q. That would be preparatory to take-off, would it not, from a map itself or as you are approaching from a map?

A. If you are approaching this airport, yes, you would—usually you will plot your course and draw your line on the map right to the airport itself and fly that course to the airport.

Q. At which time you would familiarize yourself with the location of the airport in relation to the city, is that right, sir? A. That is right.

(Deposition of Bernard John Oswald.)

Q. Now, what is the area that is subject to airport control?

A. Well, that depends on the particular type of airport. If it is a control tower, if the airport is under a control tower, why, all of the traffic in the immediate vicinity of the airport with intentions of landing and taking off is controlled by the control tower, though you can fly directly over the top of the airport at a higher altitude without any contact with the control tower.

Q. Yes, sir. And what is the procedure that is followed [52] preparatory to landing in regard to radio contact?

A. Well, usually the—normally if you are using radio facilities, why, you would close your flight plan with the appropriate CAA facility, and then you would transfer over to the tower radio frequency and make the initial call and tell them your approximate position away from the airport and then ask for landing instructions.

Q. How do you determine your position in relation to the airport?

A. Oh, usually it is stated in terms of such as five miles southeast at three thousand feet, or something of that sort.

Q. Who determines the position in relation to the airport? A. You do yourself.

Q. How do you do that?

A. It is just an estimate of your position. That is done when you have the airport in sight for visual flying.

(Deposition of Bernard John Oswald.)

Q. When you have the airport in sight?

A. Yes.

Q. Now, what is the procedure that is followed in order to establish the location visually of the airport?

A. Well, that is part of your navigational procedure is your approaching the city you should be able to pick out your land marks, rivers, railroads, and other towns, and [53] so forth, so that you know that that course is going—is taking you right to your destination.

Q. Whose responsibility is it to locate the airport itself?

A. It would be the pilot's responsibility.

Q. Whose responsibility would it be to locate himself in regard to the airport?

Mr. Reynolds: I object to this as irrelevant, immaterial, and incompetent.

A. Would you say that again?

By Mr. Obenour:

Q. Whose responsibility is it to locate the airport itself in approaching for a landing?

Mr. Reynolds: That calls for a conclusion of the witness.

A. I would say it was the responsibility of the pilot, but there are occasions when you will need the help of the control tower operator in locating the airport.

By Mr. Obenour:

Q. What is the normal procedure to be followed in landing at a strange field, actually, when you are at the field itself?

A. Well, the procedure wouldn't be any different

(Deposition of Bernard John Oswald.)

unless the pilot was having trouble—having trouble of some kind. He would just land on the runway that was designated by the tower operator. [54]

Q. How do you locate a runway?

A. It is given by a number which refers to the mangetic heading of the runway.

Q. Do you not have to actually have visual contact with that in order to line up for your approach?

A. Yes, you would.

Q. And in coming into a strange field is it not the normal practice to over-fly an airport and get your actual bearings in regard to the airport and its landing strip that you are going to use?

A. Not actually. Sometimes you may be flying into an airport on a heading that is very—on a magnetic heading that is very close to the magetic heading of the designated runway that the tower operator will clear you in for a straight-in approach.

Q. But in order to actually locate that runway on a strange airport is it not the normal procedure to fly onto the airport, locate the runway, and then make your downwind leg?

A. You would fly in and start a circle of the airport. As I said before, it is possible to be cleared straight in in a strange airport.

Q. But would you land straight in if you did not see the airport or the runway?

A. No, that would be—[55]

Q. Any clearance you would get from the tower would still be prefaced on your visual contact with the field and its runway, would it not?

(Deposition of Bernard John Oswald.)

Mr. Reynolds: Objected to as immaterial, irrelevant, and incompetent.

A. That would be up to the pilot. I have had occasions were they have cleared me for a certain runway and which I couldn't define—an airport had some runways I couldn't define which one they meant on a strange airport, and I asked them to explain it to me further, and in the process it might mean another circle around the flight pattern to decide actually which is the correct runway to use.

By Mr. Obenour:

Q. In order to make a night landing it is necessary for you to visually get your bearings without excluding any instrument approaches or anything of that sort?

A. Yes, that is right.

Q. But for a C.A.V. night landing, it is necessary for the pilot to visually line himself up with the runway he intends to use, is it not? A. Yes.

Q. And it is necessary for him to identify the airport and its proposed runway, is it not?

A. That's right. They usually turn the runway lights on [56] on the runway that is in use, which helps the pilot to identify it.

Q. Now, to your knowledge Mr. Price had had no such experience, had he? A. No.

Mr. Reynolds: Object to he form of the question. I believe Mr. Oswald's testimony was that he didn't know of any experience.

Mr. Obenour: The question was as to his knowledge.

Mr. Reynolds: Well, I think the question is a little

(Deposition of Bernard John Oswald.)

unclear. Are you asking him if he knows whether Mr. Price has no night flying, or are you asking him with regard to any night flying that he knows Mr. Price has or doesn't know he has?

By Mr. Obenour:

Q. Do you know whether or not he had any night flying experience?

A. I believe that there had been times when he had been up quite close to being dark. I don't believe he had ever been up later than the official designated time of darkness as the CAA says it is, one hour after sunset. I don't think he had ever been up that late before.

Q. Now, I believe you stated you discussed night flying with Mr. Price. What did you tell him that he should [57] do in regard to his proposed cross-country?

A. Well, I advised him that he should not do any night flying.

Q. Why?

Mr. Reynolds: Objected to as redundant.

A. I didn't give him any reason why. It is just the fact that I had never given any training to him for night flying, and I was looking—in other words, conscious of his—of the safety of his trip.

By Mr. Obenour:

Q. Did this tri-pacer have any landing lights?

A. Yes.

Q. Now, did you discuss this accident that Mr. Price had on October 18, 1956, with Mr. Price?

A. He told me about it when he got back, yes sir.

Q. Where was this?

A. He stopped by the airport.

(Deposition of Bernard John Oswald.)

Q. About when?

A. I believe several—I don't remember just how long it was. I know he was still under medical treatment when he got back.

Q. What is your best recollection as to when this took place?

A. Oh, I would say it was within two weeks after he arrived back in Tacoma. [58]

Q. And who was present at the time?

A. I believe it was just—that has been so long ago. It may have been Mr. Cunningham that was with him. I believe he was with him too, and I believe Mrs. Price was there also. He was a frequent visitor at the airport. He stopped in quite often.

Q. Now, what conversation did you have with Mr Price about this accident?

A. Oh, as I remember, he described to me what had happened out there.

Q. What did he tell you?

A. Well, he said—

Mr. Reynolds: That is objected to as hearsay.

A. I can't remember his exact words due to the length of time that has elapsed, but—

By Mr. Obenour:

Q. What is your best recollection?

A. The best recollection I have is that they were flying from El Paso to Phoenix on a flight plan, and that he arrived near Phoenix just a little later than he expected, but it was still daylight. He said it was still daylight when he arrived over Phoenix, but that the control tower operator wouldn't let him come in and

(Deposition of Bernard John Oswald.)

land immediately due to heavy other traffic around the airport. My impression was that he felt that the [59] control tower operator kept him out too long and it was gradually getting darker all the time.

Q. What did he tell you?

A. Well, those are—that—

Mr. Reynolds: My objection as to hearsay goes to all of this, incidentally.

A. That is the gist of what he told me, and he said he advised the tower that he was unfamiliar with this area and needed help in getting in.

As I remember, he was flying around in the vicinity of the airport and thought he had the runway in sight, and the control tower operator asked him if he had the runway in sight, and he saw these lights which he thought were the runway, and he told him he did have the runway in sight, and the tower operator told him he was cleared to land.

He said when he was approaching these lights he turned on his landing lights and suddenly saw some buildings and poles in front of him and attempted to pull up but that the left wing clipped the top of a pole and pulled them on into the ground—on into this shed in the stockyards.

Q. Do you recall, sir, for the purpose of refreshing your recollection, you were contacted by a Special Agent of the Federal Bureau of Investigation on January 26, [60] 1959, at your office? A. Yes.

Q. Roy G. Sjostrand, S j o s t r a n d (spelling)?

A. Yes.

(Deposition of Bernard John Oswald.)

Q. Do you recall at that time you were asked questions about this same matter? A. Yes.

Q. And do you recall at that time any statement you gave him, Mr. Sjostrand as to the fact that you had not given any night flight instructions to Mr. Price?

A. No, I don't. I remember he wanted to see Mr. Price's records. I showed him these records here (indicating).

Mr. Reynolds: You are referring to Exhibit A, Mr. Oswald?

The Witness: Yes.

A. (Continuing) And I can't remember definitely anything about our conversation. I believe it was more or less generalized as to what more or less surrounded what his flight experience had been or what training he had had.

By Mr. Obernour:

Q. Do you recall at that time you made a statement to the Special Agent that Mr. Price being older, his reactions were slower than the average pilot?

A. No, I don't remember that. [61]

Q. Could you have?

A. He didn't write anything down as I remember. Maybe he did make a few notes. I don't remember. I could have told him that.

Q. And do you recall that you told him that Price wanted to do some night flying but you had discouraged it because his ability to fly appeared to be slower than for the average pilot?

A. No, I don't remember that.

(Deposition of Bernard John Oswald.)

Q. Could you have?

A. I could have said that, yes.

Mr. Reynolds: I object to all of these questions. You are cross-examining your own witness, Mr. Obenour.

Mr. Obenour: For the purpose of refreshing his recollection as to the interview.

Mr. Reynolds: That is a neat trick, but I don't think it can be done that way.

By Mr. Obenour:

Q. Now, assuming that a pilot in approaching a strange field, would the normal procedure not require that he orient himself visually by the runway he was to use? A. He would, yes.

Q. And assuming that a pilot in a night landing were on an approach and you were to find he had undershot the [62] runway, and that he then would have obstruction, what would then become visible to him, would this then require the emergency procedure which you have previously described for a pull-up and go-around? A. Yes.

Q. And would the reaction to such a situation that I have just described, Mr. Oswald, of the individual pilot be affected by his experience and his normal reaction time?

A. Well, that is a difficult one to answer because if he had any experience in night flying, he would be able to define all those things ahead of time. He could see the obstructions would be lighted. I think that the case of being in doubt would stimulate a reaction to go around again.

(Deposition of Bernard John Oswald.)

Q. Then, if I understand you, the fact of his experience, would that have come into the predicament in the first place rather than—

Mr. Reynolds: All this is speculative. I don't think it is admissible.

By Mr. Obenour:

Q. Then, if I understand you then—

A. Inexperience—yes, inexperience with night flying was—would be the underlying cause of getting into a predicament. Anybody would know that, any pilot. [63]

Q. So the man's inexperience would have created the predicament in the first place, is that right, sir?

Mr. Reynolds: Objected to as speculative.

A. Of course, the location of the airport could have something to do with it. In my experience I have had trouble locating airports at nighttime also, and especially in big cities.

Q. Yes, sir. And the normal procedure would be to establish your actual position with the runway visually before coming into a landing position from which you could not recover, would it not?

A. My method would be to have the airport identify themselves by turning up the intensity of their lights or turning on the instrument approach lights, if they had any, at the airport, and then the tower operator should identify the airplane in question by having him turn his landing lights on to see if he can spot the airplane and guide the pilot into the field.

Q. When the tower operator has been advised the

(Deposition of Bernard John Oswald.)

pilot has the runway in sight, is there any responsibility then on the tower operator to control that aircraft?

Mr. Reynolds: Objected to as speculative and incompetent.

A. I don't know what the—just what responsibility the CAA places on the tower operator in cases like that. [64]

Q. Whose responsibility is it for the safety of an aircraft?

Mr. Reynolds: All these questions with regard to responsibility call for a legal conclusion.

Mr. Oswald is certainly an expert, which I will readily concede, but I don't think he is competent to say what responsibility rests on the tower operator. That is what this action is all about.

Mr. Obenour: The normal practice of flying, I believe, pertaining to this.

Mr. Reynolds: Ask him what the normal practice of flying is. That may be or may not be what his legal responsibility is.

By Mr. Obenour:

Q. In the practice of flying whose responsibility is it for the safety of the aircraft?

Mr. Reynolds: Subject to the same objection.

A. In a controlled airport it is probably a dual responsibility with the pilot and the control tower operator, because you have to follow his instructions.

Q. And the instructions consist of what?

A. Of the tower operator as to the runway you are to land on. If you don't, you are violating the

(Deposition of Bernard John Oswald.)

Civil Air regulations, that is, if you don't obey his orders.

Q. And the instructions would be as to a particular runway to land on, would it not? [65]

Mr. Reynolds: Objected to as speculative.

A. I didn't get the last sentence.

By Mr. Obenour:

Q. Those instructions to which you have been referfing would be as to the particular runway to use, would it not?

A. Yes. The particular runway to use and your position in the pattern too, and your landing sequence in relation to the airport and other aircraft.

Mr. Reynolds: Also irrelevant, incompetent, and immaterial, as to what action happened in this particular instance.

By Mr. Obenour:

Q. In the normal course of flying over and above the instructions that you are given as to which runway to use and the position in traffic, who determines the actual operation of the airplane?

A. Actually the pilot can place more responsibility on the control tower operator. I have been in predicaments myself where I have had to ask for their help in locating the airport, and they would even tell you where to make your turns. Actually they would tell you when to turn and where to make your turn even. It is up to the pilot to decide whether he wants to land. He can at any time tell the control tower that he is going to abort the landing, and he can leave the

(Deposition of Bernard John Oswald.)

airport—the [66] area and decide to go to another airport if he wants to do that.

Q. Who is in control of the airport on its approach, the actual physical operation of the airplane?

A. Well, the pilot is actually physically operating the airplane.

Q. And in normal flight practice in a night landing, is there any procedure to follow on a strange field as to your position on the runway that you would land on?

A. Sometimes the tower operators are very helpful in giving information about avoiding obstructions or telling you to be sure and watch out for a particular tower or building or something off to the end of the runway, or something of that sort.

Q. Is there a normal practice as to having the runway actually in your landing lights on your approach before you set down?

A. Normally the landing lights on these smaller planes don't—they don't show up very much. They are not of high enough intensity. But actually all you can count on them doing is showing the runway or the ground as it looms up for the last—for about the last fifty feet of altitude is about the most use that you get out of your landing lights on these light aircraft.

Q. With the landing lights on this light aircraft are you [67] actually able to see the runway itself in the lights before you begin your flare-outs?

A. Yes, you can in the areas from a hundred feet on down, why, they will pick out the runway. You can actually see the runway.

(Deposition of Bernard John Oswald.)

Q. And in approaching a strange field is there not a normal practice to follow of a type of dragging approach that would permit you to actually see the runway in your lights before you would descend to this elevation below a hundred feet and begin your landing itself?

A. Normally you will find approaches made in reference to the runway itself and judging your angles from your aircraft to the ground. There is no particular it is more or less just a judgment of altitide. Your altitude is not judged by your altimeter for your last phases of your approach, and then normally the runway lights are turned on on your final approach so that they will help you in—I think in light aircraft to determine your actual height above the ground. But they have nothing to do with your position along the runway or your height above the airport.

Q. But now the question was, in a strange-field approach for night landing, would not the normal procedure be to maintain your altitude until you actually had visual contact with the runway before descending the [68] last hunded feet into your flare-out and actual landing? A. Yes, that is right.

Q. And had this—

Mr. Obenour: That is all.

Mr. Reynolds: Are you through questioning?

Mr. Obenour: Yes.

Cross-Examination

By Mr. Reynolds:

Q. Mr. Oswald, what certificates and ratings do you presently have?

(Deposition of Bernard John Oswald.)

A. Commercial pilot certificate with single and multi-engine land flight instructor and instrument.

Q. You said flight instructor and instrument?

A. Yes, that is a rating.

Q. Now, Oswald Flying Service also provides a ground school, does it not? A. That is right.

Q. The Tacoma Airport is also popularly known as the Oswald Field, is it not? A. Yes.

Q. Although that is not its proper name?

A. No.

Q. Now, this exhibit which we have introduced along with [69] this deposition—which Mr. Obenour has introduced along with this deposition, this only shows such instruction as Mr. Price may have had through the issuance of his private certificate, is that correct? A. That is right.

Q. It wouldn't show any flying after that?

A. Normally we don't keep these records after they obtain their certificate.

Q. Is it possible that there was some—that Mr. Price had some flight experience prior to the granting of his private certificate that does not appear on those worksheets of yours? A. It is possible.

Q. Mr. Oswald, is there any particular requirement in the regulations of the CAA as to how many hours a private pilot must have before he can attain a private pilot's certificate?

A. The minimum number of hours on a—in an approved flying school are 35 hours before he can take his flight tests, and it is 40 hours on the non-approved flying school.

(Deposition of Bernard John Oswald.)

Q. In your experience do most pilots complete—I am sorry, strike "complete"—do most pilots obtain their private certificate within 40 hours? A. No. [70]

Q. As a matter of fact, only a very few of them would obtain it within 50 hours, is that right?

A. That is right.

Q. And isn't it quite often true that a pilot will have over a hundred hours before he actually obtains his private certificate not because he isn't ready but merely because he doesn't bother?

A. That is true.

Q. Would you consider Mr. Price's number of hours of flying before he obtained his private certificate as abnormally long? A. No.

Q. Now, there was some testimony on your examination by Mr. Obenour as to emergency pull-ups, and I believe we defined it.

Am I correct in saying that most of Mr. Price's training prior to his obtaining his private certificate was in an Aronca 7A3? A. 7AC.

Q. 7AC? A. That is right.

Q. That is commonly known as an Aronca Champion? A. That is right.

Q. As I recollect it, you stated in the tri-pacer the normal emergency pull-up procedure was to give it full [71] throttle, take the carburetor heat off—

A. Yes.

Q. —and ease the flaps up? A. Yes.

Q. Now, how does that differ from the emergency pull-up procedure in an Aronca Champion?

(Deposition of Bernard John Oswald.)

A. The only other consideration in an Aronca Champion would be that you do not have any flaps.

Q. In other words, everything would be the same?

A. Yes, everything the same.

Q. Except for the flaps? A. Yes.

Q. Did you ever give Mr. Price any instruction after he obtained his private certificate in the operation of the tri-pacer? A. Yes.

Q. Did you check him out in it?

A. Yes, I did.

Q. Did you give him the emergency procedure for pull-up? A. Yes, I am sure I did.

Q. Including the fact that he had to ease the flaps off? A. Yes.

Q. Now, tell me, why is it that in an emergency pull-up procedure in an aircraft with flaps you must ease the flaps up rather then simply knocking them up very quickly, [72] "dumping" them is the technical term, I believe?

A. Sudden movement of the flaps upwards causes a loss of lift and will cause the airplane to settle and not be able to climb as quickly.

Q. However, in order to get maximum climb it is essential that you do get your flaps up, isn't that right? You can't—let me rephrase the question.

The maximum rate of climb with full flaps is less then the maximum rate of climb with no flaps at all, is that right? A. That is right.

Q. Now, on your examination by Mr. Obenour there was a lot of discussion of reaction time and various factors affecting it.

(Deposition of Bernard John Oswald.)

Mr. Obenour brought up age. It is also true, isn't it, that in flying an aircraft there are any one of a myriad of things which can affect reaction time in a particular individual at a particular time?

A. That is right.

Q. He may be a little tired, and he may at that particular time or moment have an itch on the side of his nose which he is scratching? A. Yes.

Q. As a matter of fact, reaction time would be some slowed by insects in the cockpit, would it not?

A. That could be true, yes. [73]

Q. Now, Mr. Oswald, you testified that you went over the general outline of Mr. Price's trip which culminated in the accident which this lawsuit is about.

Can you tell us just in general terms where that trip went?

A. Yes. He was going from here to New York City with Mr. Cunningham and Mr. Cunningham's wife to attend the marriage of Mr. Price's son, I believe, in New York, and then they intended to fly on down the eastern coast line in a southerly direction, and then cut across through Lousiana, and then with a short jaunt down into Mexico. I believe they went through Brownsville, Texas, on a short jaunt on into Mexico, and then came back on up, and they intended to go on through El Paso and Phoenix and on towards San Francisco and on up continuing their trip that way home.

Q. In other words, if this flight had taken place as planned, Mr. Price would have flown from here to

(Deposition of Bernard John Oswald.)

New York, and from New York into Mexico, and from Mexico back up into Arizona? A. Yes.

Q. Before they had this accident? A. Yes.

Q. Now, there was—oh, yes, was Mr. Cunningham a licensed pilot at the time of this trip? [74]

A. No.

Q. Had he had any hours of instructions leading towards that objective, to your knowledge?

A. Yes, he had had some instruction in Mr. Price's airplane as I recall.

Q. Had he soloed?

A. No, I believe not.

Q. Had he had any cross-country instruction in the aircraft itself?

A. No. He may have ridden with Mr. Price or myself on one or two short cross-country trips.

Q. But you don't remember whether he did or not?

A. I can't remember.

Q. Now, there was some discussion of normal practices in making landing at strange airports, particularly at night. My questions here will be directed only towards those airports which have control towers.

Isn't it normal practice when landing at any airport, strange or not, which has a control tower, to follow the instructions of the control tower?

A. Yes.

Q. And as a matter of fact, doesn't the CAA request pilots to contact control towers at airports to which they are going if they have trouble locating the airport and call on the control tower for assistance in locating [75] the airport in making a landing?

A. Yes.

(Deposition of Bernard John Oswald.)

Q. As a matter of fact, isn't it true that most flight instructors as a general practice very carefully instruct their students when flying into airports that have control towers to do just exactly that?

A. That should be part of the instructor's training program.

Q. In your opinion—

A. The CAA themselves usually advise the pilots never to be bashful in asking for help when they have any problems on their—using a radio to ask for help when they have any problems either enroute or at their destination or the airport they are landing at.

Q. Now, Mr. Oswald, does the Airmen's Guide, which was referred to several times on direct examination, give the pattern of landing lights at a particular airport? A. No.

Q. Mr. Oswald, what is the altitude above sea level of Oswald Field or Tacoma Airport?

A. 375 feet.

Q. And how many runways does that airport have?

A. Well, at the present time we have only one usable runway.

Q. What runways did it have prior to October 18, 1956? [76]

A. It had two runways.

Q. And what kind of surface were those runways?

A. At that time it was just oiled gravel.

Q. Is the surface any different now?

A. Yes. It is oil mat surface now, the one runway.

Q. Tell me, from the beginning of Mr. Price's private training until October 18, 1956, were both runways in common use?

(Deposition of Bernard John Oswald.)

A. The original short runway was only used occasionally at that time.

Q. What are the lengths of those two runways?

A. The longest runway is 2425 feet, roughly. The shorter runway was, I believe, 2158 feet.

Q. Now, the runway which you spoke of a moment ago, the main runway, would be the 2425 foot one?

A. Yes.

Q. Is your airport equipped with lights?

A. Runway lights, yes.

Q. Does it have a rotating beacon?

A. No.

Q. What color are those runway lights?

A. They are white with—the four lights across the end are red, and the two lights lining with the runway are green.

Q. And how far are those lights apart lengthwise of the runway? [77]

A. Three hundred feet.

Q. And how far are they apart crosswise of the runway?

A. Somewheres between 250 and 300 feet.

Q. Now, I believe you said you landed at the Sky Harbor Airport in Phoenix on one occasion?

A. Yes.

Q. Was that a night landing?

A. Daytime.

Q. Are you personally familiar with the lighting facilities at the Phoenix airport?

A. No.

Q. Can you tell me from the Airmen's Guide what kind of lighting facilities they have?

(Deposition of Bernard John Oswald.)

A. It is just designated as runway or strip lights in the Arimen's Guide.

Q. Do they designate how bright they are or what intensity they are?

A. I believe—I am referring to the current Airmen's Guide. Do you want me to look that up?

Q. You may if you like, if you have it with you?

A. I believe that the intensity can be determined.

Q. First of all let me ask you, what is the Airmen's Guide, Mr. Oswald?

A. It is a booklet put out by the FAA and issued every two weeks, which includes information as to all their [78] navigational facilities and airport directory, and lists of obstructions to air navigation, and any hazard that the pilot might run into. It lists the changes and additions or deletions in the radio facilities, both at the airports and along the airways, and it lists changes in civil air regulations, and practically all the information that a pilot needs for a cross-couuntry flight.

Q. This is an official publication of the Federal Aeronautics Administration, formerly the Civil Aeronautics Administration? A. Yes.

Q. All right. Now, will you tell me what information the Airmen's Guide gives about the airport at Phoenix?

Mr. Obenour: Excuse me, what is the date of the document you are looking at?

The Witness: This is the July 7 issue. The latest issue is September 15.

(Deposition of Bernard John Oswald.)

By Mr. Reynolds:

Q. Both 1959?

A. Yes. The airport information comes out only every quarter. That issue comes out every three months, and then the others are—this is the main volume, and these are supplemental ones. The next full issue comes out and these two will be obsolete, and they keep [79] adding and revising to the main issue all the time.

Mr. Obenour: I object to this as being subsequent in time as to October 18, 1956, to the degree they will vary from the then current Airmen's Guide would not be relevant in this matter.

Mr. Reynolds: All right. Fine.

By Mr. Reynolds:

Q. Go ahead, please.

A. This issue shows high intensity runway lights.

Q. Now, tell me how would those lights differ from yours?

A. They would be much stronger and visible through haze and fog, and the intensity of the lights can be controlled from the control tower.

Q. Now, before I ask my next question, Mr. Oswald, is your airport used by airlines, either scheduled or non-scheduled? A. No.

Q. Would the spacing of the lights in Sky Harbor Airport be different from yours considering the fact that it is a municipal airport which is used by airlines?

A. Yes. I am sure their light system would be set up according to standards approved by the FAA.

(Deposition of Bernard John Oswald.)

Q. Would your airport at night appear different to a pilot in the air from the Sky Harbor Airport? [80]

A. Yes.

Q. Would it be harder to find? A. Yes.

Q. Would the lights appear a good deal dimmer?

A. Yes.

Q. That is, the runway lights.

A. The runway lights are of a low-intensity type.

Mr. Obenour: Objection to this line of questioning. There is no basis—no proof in this matter that there was any experience in night flying with Mr. Price.

Mr. Reynolds: I believe Mr. Oswald testified he took Mr. Price on a trip and landed him at his own airport. In any case, he answered the question, hasn't he? May I ask the reporter if he answered the question?

The Reporter: Yes.

By Mr. Reynolds:

Q. Now, Mr. Oswald, in landing an aircraft at night on a runway which has lights, can you ever actually see the surface of the runway itself?

A. Not unless it is a moonlight night.

Q. This would be true even though the aircraft had landing lights? A. Yes. [81]

Q. And the landing lights were on?

A. Yes.

Q. Is that right?

A. Well, you should be able to see the—with the average small aircraft you should be able to see the surface of the runway from—depending on the angle the airplane is approaching to the airport, probably from a hundred feet to two hundred feet. If they are

(Deposition of Bernard John Oswald.)

approaching at a flat angle, why, the lights wouldn't pick out the runway as quick as if they were coming in at a steeper angle.

Q. Now, Mr. Oswald, let us assume that there is an obstruction of some sort of a not very substantial nature, let us say a pole or a post sticking up out of the runway, and the runway lights pick out the obstruction in what you say is the normal distance you can see with runway—with landing lights on, and you go through the emergency procedure for pull-up, would it be possible normally for an aircraft such as a Piper tri-pacer to clear that obstruction in that space, assuming you go through the normal emergency procedure?

A. It is pretty hard to answer that question.

Q. Do you mean you couldn't express an opinion on whether he could or not? [82]

A. It would depend on how quick you spotted it. I don't think I could express an opinion on that.

Q. In other words, it may be entirely possible for a pilot to go through this emergency procedure as soon as it was physically possible for him to see the obstruction and not clear the obstruction, is that right, sir?

A. Oh, yes.

Mr. Reynolds: No further questions.

Redirect Examination

By Mr. Obenour:

Q. However, with proper experience a pilot would not be put in a position where that obstacle would have created a hazard in the first place, isn't that right, sir?

(Deposition of Bernard John Oswald.)

Mr. Reynolds: Pardon me, I didn't get the question.

Mr. Obenour: Read it.

(Whereupon the last question was read by the reporter.)

Mr. Reynolds: I will object to that as being vague and indefinite.

A. Any obstructions on an airport are supposed to be lighted as such, any poles or any surrounding an airport. [83]

By Mr. Obenour:

Q. But an experienced pilot would have avoided them, is that right?

Mr. Reynolds: Arguing with his own witness.

A. With experience, yes. The pilot should be conscious of obstructions around an airport and take every means to avoid them. I think that even without experience I think that probably he is conscious there would be obstructions around the airport, buildings, and so on, that you would worry about.

By Mr. Obenour:

Q. In this emergency pull-up that you described, what is the effect of attempting to pull-up that you raising your flaps?

A. The airplane would be able to climb, but the rate of climb would be slower.

Q. Would it create a tendency to mush?

A. Yes.

Q. And by "mush" you mean—

Mr. Reynolds: Explain the term.

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. What is meant by the term "mush"?

A. The airplane is—would be proceeding through the air without gaining any altitude, and it is usually associated with the possibility of a stall. [84]

Q. So that improper emergency procedure would—first, if flaps were not pulled up and power were applied, what would be the reaction?

A. Well, if the airplane has an excess of flying speed, full flaps will tend to give a momentary surge of lift, but which will be quickly dissipated due to the high resistance that the flaps offer to the air flow.

Q. Then?

A. But there could be a momentary surge of fairly fast climb.

Q. But if it is a landing position on an approach and power is applied—first of all, normally what is the rate of approach in relation to the normal flying speed of an airplane?

A. Well, in this particular airplane—

Mr. Reynolds: Which particular airplane are you talking about, the tri-pacer?

The Witness: The tri-pacer. The normal approach would roughly be about eighty miles an hour.

By Mr. Obenour:

Q. What is the stalling speed?

Mr. Reynolds: Let's explain that too.

A. The stalling speed, I believe, in that airplane is roughly about fifty miles an hour. [85]

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. What is meant by "stalling speed"?

A. That is when the air speed of the—the forward or air speed of the airplane is reduced to such an extent the wings will no longer maintain flight.

Q. Are there different stalling speeds on an aircraft?

A. Yes, depending on the configuration of the airplane whether the flaps are down or up or whether power is being applied or not.

Q. And in a normal approach, the tri-pacer speed of eighty miles an hour, what are the different reactions that would occur from a normal emergency operation and then a failure to follow the normal procedure?

A. Well, roughly about sixty-five miles an hour on the airplane would begin to settle and then when the air speed dropped to fifty or below, there probably would be a complete stall which would cause the nose of the airplane to drop.

Q. And if on this approach the flaps are raised suddenly, what would happen?

A. It would cause the airplane to settle unless the pilot compensated for it by pulling up the nose if he had enough reserve speed to do it.

Q. Without the reserve speed what would happen?

A. The airplane would settle. [86]

Q. And if this emergency arose as a result of an obstacle which was in the path of the aircraft and

(Deposition of Bernard John Oswald.)

higher than the aircraft, what would happen by the sudden raising of the entire flap?

A. Well, it would probably cause the airplane to settle then.

Q. And it would not clear the obstacle, is that right? A. Yes.

Q. What would happen if you failed to raise the flaps at all?

A. Well, the airplane would just—are you—are you applying flying power?

Q. Yes.

A. With that particular airplane you can still climb with full flaps on. The rate of climb would be slower over a period of time.

Q. You referred to a mushing, what is that?

A. Well, "mushing" would be—I mean that depends on whether you are making an approach or climbing out.

Q. I am speaking of the emergency procedure.

A. On the approach, why, he would be—in other words, if the air speed were reduced too much, why, the airplane would begin to mush or settle before it stalled.

Q. But the result as to an obstacle would be what?

A. That is not quite clear with me. [87]

Q. Well, you are coming in on your approach, and you have this obstacle in front of you and above you, and you attempt to clear it, and you attempt emergency procedure but fail to raise your flaps and the mushing resulted, what would be the reaction of the plane to the obstacle?

(Deposition of Bernard John Oswald.)

A. Well, if he failed to raise the flaps, you say?

Of course, I don't know what the result would be. It would depend on how fast he applied the power and how much he pulled the nose up, how much he felt he could get out of the airplane without stalling.

Q. This mushing factor you are talking about, is it not, sir, that the condition would be the plane would not climb but would continue in a near-stalled position without a climb and without changing altitude?

A. If he didn't apply enough power, but the tri-pacer will climb with full flaps.

Q. Within its normal climb for which it was designed?

A. No. The best configuration for getting out of a tight spot with a tri-pacer is with half flaps.

Mr. Obenour: I believe that is all.

Recross-Examination

By Mr. Reynolds:

Q. But if the flaps were left down, full power were immediately applied and the nose pulled up, it is [88] possible for the aircraft to clear an obstruction in its path, this particular aircraft?

A. Yes.

Mr. Reynolds: That is all.

Redirect Examination

By Mr. Obenour:

Q. The last question would depend, would it not, on the height of the obstruction above the flight of the path of the aircraft?

(Deposition of Bernard John Oswald.)

A. That is right, although, they were in the first phase how much rate of climb they had left.

Q. And the position of the approach as well.

In other words, the degree of change from the approach altitude of the plane to the climb altitude?

A. Yes. There are many variable factors there.

Mr. Obenour: I believe that is all.

Mr. Reynolds: That is all I have.

(Witness excused.)

(Pursuant to stipulation the signature of the witness to his deposition was waived.) [89]

Certificate

State of Washington
County of Pierce—ss.

I Gerald J. Popelka, a notary public duly commissioned and qualified in and for the County of Pierce, State of Washington, do hereby certify that pursuant to subpoena there came before me on the 30th day of September, 1959, at the hour of 10:00 o'clock a.m. Bernard John Oswald who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neigher attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 30th day of September, 1959.

[Seal] /s/ GERALD J. POPELKA.

EXHIBIT A ATTACHED
(Pages 141 to 146)

[Endorsed]: Oct. 5, 1959.

Form ACA 391
(Rev. 6-15-41)

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON

School Graduation Certificate

This is to certify that GLENN AMBROSE PRICE (Name)

BURTON, WASHINGTON (Address) was graduated from the

PRIVATE PILOT curriculum of the

OSWALD FLYING SERVICE (School)

CENTER & WILDRED, TACOMA, 66 WASHINGTON (Address) Air Agency Certificate No. 7337

on JULY 28, 1955 (Date); that he has successfully completed the instruction required by the Civil Air Regulations and is eligible to apply for a PRIVATE PILOT Certificate and A. S. E. L. Rating as issued by the Administrator of Civil Aeronautics.

The record of this graduate is as follows:

Flying time:

Dual 43:35

Solo 33:40

Total 77:15

Final flying grade 82%

COURSES SATISFACTORILY COMPLETED	GRADE
PRIVATE PILOT WRITTEN EXAM	100%

I certify that the above statements are true.

OSWALD FLYING SERVICE (School)

By (Signature)

CHIEF PILOT (Title)

Date issued July 28, 1955

16—8127-1 U. S. GOVERNMENT PRINTING OFFICE

141

NAME Glen Price

Course Priv

Date	Airplane Number	Dual	Solo	Instructor's Initials	Pre-Flight	Taxiing	Climbs & Glides	Turns	Stalls	S-Turns	Pattern & Track	TO & Ldg's	X-Wind Ldg's	Turns Ar' Point	Emergencies	Slow Flight	Spirals	8's on Pylon	Chandelles	Lazy 8's	Slips	Radio	Coordination	Average Grade	
2-22/55	1229E	:45		GP	3	4																		4	G. A. Price
3/18	8506	:50		GP	3	4																		4	G. A. Price
3/20	8506	:35		GP	3	3		4															4	4	G. A. Price
3/22	3971V	:50		GP	3		4	3															3	3	G. A. Price
3/26	1229E	:50		GP	3	3	4	3															3	3	G. A. Price
3/27	3971V	4:50		GP	3	X-C																	3	3	G. A. Price
3/29	1229E	:50		GP	3	3	3																	3	G. A. Price
4/1	1229E	1:10		GP	3	3	4		4														3	4	G. A. Price
4/2	8416G	1:00		GP	3	3	4	3															3	3	G. A. Price
4/3	8416G	:50		GP	3	3	3	3	4			4												4	G. A. Price
4/5	8416G	:50		GP	3	4	4	4	4			4												4	G. A. Price
4/18	8416G	:50		GP		4	4	4	4			4		X wind										4	G. A. Price
4/19	8416G	:55		GP		4	4	4	4			4												4	G. A. Price
4/21	8416G	1:00		GP	3	3	4	4				4		Spirals & Eights										4	G. A. Price
4/27	3971V	4:0		GP			Tacoma - Olympia & return																	4	G. A. Price
4/29	8416G	1:35		GP	3	4	4	4				4												4	G. A. Price
5/1	1229E	1:00		GP	3	4	4	4				3												4	4	G. A. Price
5/2	1229E	1:05		GP	3	3	4																		G. A. Price
5/3	1229E	1:00		GP																OK					G. A. Price
5/8	1229E	1:00		GP	3	3	X-																4		G. A. Price
5/13	1229E	:55	:10	GP	3	3		4					4											3	G. A. Price
5/14	1229E	.55	.15	GP	3	3	4	4					3											4	G. A. Price
5/20	1229E	.10	.40	GP	3	3	4																	4	G. A. Price
5/22	8506	:25	:35	GP	3	3	4	4			4													4	G. A. Price
5/23	3971V	1:05		GP	3	3	4			Radio														4	G. A. Price
5/23	1229E	:10	:50	GP	3		3	3					3											3	G. A. Price
5/24	8506	:25	:10	GP	3	3							4		4									4	G. A. Price
5/25	1229E	1:20		GP	3			4					4												G. A. Price
5/27	1229E	1:45	:15	GP	3	3	4																		G. A. Price
5/27	1229E		1:15	GP			4																		G. A. Price
6/1	1229E		:55	GP		4	4						4										4	4	G. A. Price
6/2	1229E		1:25	GP		4	4						4										4	4	G. A. Price
6/3	8506		1:05	GP		4	4						4										4	4	G. A. Price

REMARKS:

OSWALD FLYING SERVICE

OSWALD FLYING SERVICE

NAME Glenn Price

Course Priv.

Date	Airplane Number	Dual	Solo	Instructor's Initials	Pre-Flight	Taxiing	Climbs & Glides	Turns	Stalls	S-Turns	Pattern & Track	TO & Ldg's	X-Wind Ldg's	Turns Ar' Point	Emergencies	Slow Flight	Spirals	8's on Pylon	Chandelles	Lazy 8's	Slips	Radio	Coordination	Average Grade	
6/5/55	1229E	2:00	:20	BJO	3	3	3	4		Strange Field Check ride														4	G. A. Price
6/6/55	"	1:00	1:15	BJO	3		Spins - demonstrate accelerated stalls																	4	G. A. Price
6/7	"		1:05	BJO	Smith Tacoma - Puyallup [illegible]																				G. A. Price
6-10-55	76684	5:30		CB	DUAL XC SALEM + RETURN RADIO PROCEDURES + BEAM BRACKETING																				G. A. Price
6-12-55	1229E		1:40	BJO	Olympia - Shelton - Tacoma																				G. A. Price
6-13-55	"	:55	:45	BJO	Stalls, accelerated stalls, 720's																			4	G. A. Price
6-15-55	"		1:55	CB	SOLO XC TACOMA-BREMERTON-SNOHOMISH-TACOMA																				G. A. Price
6-16-55	"		1:30	CB		4	4	4				4													G. A. Price
6-17-55	"		2:20	BJO	Solo XC Tacoma - Hoquiam - Return																				G. A. Price
6-23-	"	~~[illegible]~~	1:30	CB	" XC Chehalis + return																				G. A. Price
6-25-55	76684	2:30		BJO	XC Tacoma to Ellensburg + Return																				G. A. Price
7-5-55	1229E		1:20	BJO	practice flying compass headings																				G. A. Price
7-6-55	"		5:05	BJO	Tacoma Portland Salem + return XC																				G. A. Price
7-12-55	"		1:00	BJO	720's Coord TO + L																				G. A. Price
7-12-55	"	1:00		BJO	Simulated high altitude + short field T.O. Wheel landings																				G. A. Price
7-13-55	"	1:10	:30	BJO	Stalls - 720's climbing stalls - Spot L																			4	G. A. Price
7-14-55	"		1:40	CB	720's Pivot Line S turns																				G. A. Price
7-22-55	"	1:20		BJO	Turn around point, steep turns stalls accelerated stalls																			4	G. A. Price
7-24-55	"		1:35	BJO	"	"	"	"	"																G. A. Price
7-25	34160	1:00		C	3	3	3	3	3		3	3			3	3	Wheel Ldgs (2)							3	G. A. Price
7-25	1229E	:20	:30	BJO	3	3	3					3	Wheel landing												G. A. Price
7-28-55	"	:50		JW	Private Sequence																				G. A. Price
7-28-55	34160		:30	JW	T.O. + Landings																				G. A. Price
8-1	1229E		:40	C	Passed Private Pilot Test OK																				403-[illegible] [signature]
8-10	1229E		1:20	C	"	"	"	"	"	"															

REMARKS:

In the United States District Court
For the District of Arizona

(Consolidated)
Civ.—2962—Phx.
Civ.—2963—Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

GLEN A. PRICE and JANE DOE PRICE, husband and wife,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DEPOSITION UPON ORAL EXAMINATION OF DR. FORREST L. FLASHMAN

Be It Remembered, That the deposition upon oral examination of Dr. Forrest L. Flashman was taken at the instance of the Plaintiffs herein in the above-entitled and numbered Causes on the 22nd day of September, 1959, at the hour of 11:00 a.m., at the office of Dr. Forrest L. Flashman, 1120 Cherry Street, Seattle, Washington, before Eugene E. Barker, Official Court Reporter and a Notary Public in and for the State of Washington, residing at Tacoma. [1]*

*Page number appearing at bottom of Original Deposition.

(Deposition of Dr. Forrest L. Flashman.)

Appearances: The Plaintiffs herein being represented by Robert M. Reynolds, of the firm of Metzger, Blair & Gardner;

The Defendant herein being represented by John S. Obenour, Jr., Assistant District Attorney.

Whereupon, the following proceedings were had and done, and testimony taken, to-wit: [2]

Mr. Reynolds: Let the record show that this deposition is being taken pursuant to the usual stipulations, waiver of time and place, waiver of all objections until the time of trial.

Is that all right, Mr. Obenour?

Mr. Obenour: Yes.

Whereupon, Dr. Forrest L. Flashman, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Reynolds:

Q. Will you state your name, sir?

A. Forrest L. Flashman.

Q. And your residence?

A. 3939 Surber Drive, Seattle.

Q. And you are a physician? A. Yes.

Q. Any particular specialty?

A. The specialty of orthopedic surgery.

Q. Will you summarize for us briefly your training and experience as an orthopedic physician?

A. I am a graduate of the Northwestern University Medical [3] School, 1941. I interned the following year at Swedish Hospital in Seattle, '41 to '42. The

(Deposition of Dr. Forrest L. Flashman.)

next year I went at Children's Hospital in Denver as an orthopedic resident in preparation for the practice of orthopedic surgery, postgraduate training. The following three years, 1943 to 1946, I spent as a fellow at Mayo Clinic in orthopedic surgery. The next two years, to '48, I stayed with the staff of the Mayo Clinic and did orthopedic surgery for them, and came to Seattle in 1948, and have been in practice here since that time.

Q. Do you know Mr. William Cunningham?

A. Yes, I do.

Q. When did you first meet him?

A. I first saw Mr. Cunningham on October 25th of 1956.

Q. Was that as a patient? A. Yes.

Q. Will you describe his condition at that time and the circumstances under which he was referred to you?

A. At that time that I saw him he gave a history of having been in an airplane accident just a few weeks previously. He had sustained injuries to his back, and at the time I saw him he was in a body cast and had some sutures in his face. I removed some stitches from his left eyebrow from a wound he had there, and subsequently had him fitted with a hyperextension type of back brace and [4] removed his back cast.

Q. What was the extent of that cast?

A. That cast that he had on at the time I saw him was designed to bend his back backward, and ex-

(Deposition of Dr. Forrest L. Flashman.)

tended from high on the chest to the groin in front, and it was somewhat narrower in back.

Q. Well, did that cast go all the way around his body?

A. It went all around his body.

Q. What was your diagnosis initially?

A. That he had had a compression fracture of the lumbar spine, in the mid-portion of the low back area about the belt line level.

Q. Can you describe that injury a little more fully, sir?

A. Well, this is a compression fracture. It is so termed to describe a vertebral body, which is usually a square block of bone, having been mashed together in one portion of it, and like most compression fractures that are sustained in acute flexion or bending forward position, the front part of the body of this vertebra was smashed down.

Q. Were any X-rays taken at that time?

A. Yes, they were.

Q. Were they taken by you?

A. Yes, they were.

Q. Did you take X-rays at that initial visit? [5]

A. Yes, I did. We took X-rays through the cast of his low back area.

Q. How many?

A. There are two views, which include one from the front and one from the side.

Q. Are there any numbers which identify those two views so that they can be distinguished from any others?

(Deposition of Dr. Forrest L. Flashman.)

A. The X-ray films which were made at that time have the patient's name, the date which they were made.

Q. That would be October 25, '56?

A. That is right.

Q. And those X-rays show the condition of the vertebrae at the time he was sent to you; is that correct?

A. That is correct. And these X-rays show a compression fracture of the body of one of the upper lumbar vertebra, and the body is compressed about 25 per cent in the anterior position.

Mr. Reynolds: I should like to include these as exhibits with the deposition, Jack.

The Witness: Do you want to number them or anything?

Mr. Reynolds: Yes, I think we had better.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 1.) [6]

Q. And let the record show that the X-ray numbered one is what, sir?

A. X-ray numbered one is an X-ray that was made of Mr. Cunningham's back in my office on October 25, 1956. It is a picture of his lower back taken in a front-to-back position, or it is called an anterior view of the lumbar spine.

Q. And the X-ray you are now marking Number 2?

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 2.)

A. X-ray marked Number 2 is an X-ray made in my

(Deposition of Dr. Forrest L. Flashman.)

office under my direction of Mr. Cunningham's back on October 25, 1956. This picture was made from the side. It is called a lateral view of the lumbar spine.

Q. Now, at that first visit, did you prescribe any treatment for this condition?

A. Yes, I did. At this visit I decided that the cast which he had on could be removed and he could be put into a hyperextension back brace, wouldn't be quite as bulky but which would keep his back in this hyperextended position for protection and healing of his fracture.

Q. Did he get that brace?

A. Yes, he did. [7]

Q. Do you know the place where he got it?

A. I believe it was Swiech's Brace Shop.

Q. The bill I have, Dr. Flashman, is from Charles C. Cullen. A. Cullen.

Q. And do you happen to know the cost of that brace? A. Not exactly.

Q. All right. When did he obtain that brace? Do you know that?

A. He was sent to Cullen's Brace Shop on the same day that I saw him, and was checked in my office the following day with his brace on, which would be October 26th of 1956.

Q. What was the purpose of the brace and the cast, Doctor?

A. The brace and the cast were used to maintain a position of hyperextension in his back which would keep the spine in an erect position, and is the reverse

(Deposition of Dr. Forrest L. Flashman.)

of the position in which he sustained his injury. In other words, his injury was sustained by having his back acutely flexed or buckled forward, and in order to treat this condition we bend the back backward and hold it there until the fracture heals.

Q. Would you say that his condition at the time you saw him was normal for a person who had had a compression fracture of the back?

A. Well, his condition was the usual of that of a patient [8] that has had a compression fracture of the back.

Q. Was he able to move around?

A. Yes, he was ambulatory. He could move around. He was living at home, traveling back and forth from his home to my office.

Q. Were there any limits on the activities of which he should engage in at that time?

A. Yes, there were quite a few limitations, in that he was to do no type of heavy lifting or subject his back to any type of strain, and he was to keep the hyperextension brace on his back night and day. At no time was he to take it off and bend forward.

Q. Do I understand you correctly to say that he couldn't bend over with either the brace or the cast on?

A. That is correct. If he bent at all, he would bend from the hips. In other words, in order to approach his shoe level he would have to bend from the hip joint, and he could not bend his back with the bracing apparatus we had on him.

(Deposition of Dr. Forrest L. Flashman.)

Q. Nor could he do any heavy lifting?

A. No.

Q. How long did he have to wear that brace?

A. I saw him at frequent intervals following the initial visit.

Q. Can you give us a rundown on the dates, sir? [9]

A. I saw him in October of 1956, and in November of 1956, and in December of 1956, and note that on January 2nd of 1957, that the X-rays of his back at this tme showed no further compression; that the fractures seemed to be healing solidly, and I advised him that at this time he could leave his back support off at night.

Q. Now, I note that subsequent X-rays were taken; when were the next X-rays, after the two that we have already put in evidence?

A. A single view of his spine was made from the lateral side about three or four days after I had first seen him to check position while he was in a new brace. He was X-rayed again in November, and then again in January of 1957.

Q. What was the purpose of the November X-rays?

A. Those were to check the position of the vertebral body fractured, and its healing.

Q. And the next X-rays after that were taken in January?

A. On February 12th of 1957.

Q. Were those the X-rays which formed the basis for your advice that he could take the brace off at night?

(Deposition of Dr. Forrest L. Flashman.)

A. Excuse me. The X-rays were made on January 2nd of 1957, and six weeks later, on February 12th of 1957—

Q. What was the purpose of those, the two—

A. To check the healing of his vertebral body fracture. [10]

Q. The set that was taken on January 2nd, I think you said— A. Yes.

Q. Were those the basis for your advice to Mr. Cunningham that he could remove that brace at night?

A. Yes.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 3.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 4.)

Q. Now, will you explain those and how you have marked them?

A. The X-ray that is marked Number 3 is an X-ray of Mr. Cunningham's back that was made in my office on January 2nd, 1957. It is an X-ray of the lumbar spine made in the anterior-posterior direction. And the X-ray marked Number 4 is an X-ray made on the same date, January 2nd of 1957, of Mr. Cunningham's back in my office, which is a lateral view of the lumbar spine, and it shows the deformity of the body of the upper lumbar vertebra. It also shows that there has been no further compression of the body and it appears to be healing well.

Q. Now, the next set of X-rays were taken in February?

A. Yes, sir. Do you want these, too? [11]

(Deposition of Dr. Forrest L. Flashman.)

Q. Yes, I think we had better have them.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 5.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 6.)

A. X-rays marked Numbers 5 and 6 are X-ray films made of Mr. Cunningham's back February 12, 1957, in my office. Number 5 is a film of the lumbar spine in the anterior-posterior direction. Number 6 is a film of the spine in the lateral position.

Q. Now, was this the next time after the 2nd of Junuary that you saw him?

A. Yes.

Q. And did you make any prescription at that time?

A. At this time I felt that the X-rays of the spine showed that his fracture was unchanged; in other words, there was no increase in the deformity. I felt that his fracture was healed enough for ordinary use, and advised him that he could leave his back brace off intermittently now and to wear it only if he were going to subject the back to any type of strain.

Q. That was on February 12, 1957? [12]

A. February 12, 1957.

Q. And when did you next see him?

A. I next saw him on September 11th of 1957.

Q. What was his condition at that time?

A. At this time he stated he was getting along fairly well except that he had a back that would not let him do any heavy lifting, and he noticed aching and fatiguing through his low back area by evening, and on examination on this date there was no par-

(Deposition of Dr. Forrest L. Flashman.)

ticular tenderness to either palpation or percussion. His back motion was moderately limited; in other words, he could bend over so he would come within about fourteen inches of touching the floor with his fingers, with the fingers and knees extended. Lateral bending, to the right and left, was limited about 50 per cent, and he had not up to this time been advised that he could push back bending to any degree.

Q. Did you give him any treatment at that time?

A. No, I did not.

Q. Did you take any X-rays at that time?

A. No.

Q. What was your advice to him at that time, or did you give him any?

A. Well, at this time I told him I thought his back was healed enough so that he should be able to go about his business as long as he avoided extra heavy stress and [13] strain.

Q. And when was the next time you saw him?

A. The next time I saw him was August 19th of 1959. [14]

Q. And what was his condition at that time?

A. At this time he was getting along fairly well. He stated that any time that he did any heavy type of work that he would have a little trouble with his back, with aching pain and fatiguing, and the soreness or pain in his back that he was complaining of was just a little lower in the lumbar spine than the area of his fracture. This is not too unusual as the majority of people that have compression fractures of the lumbar spine usually have a little residual difficulty with the low back about the junction of the lumbar spine and the

(Deposition of Dr. Forrest L. Flashman.)

pelvis, and Mr. Cunningham's occupation is that of a tavern owner, but he has found that he can't lift the heavy kegs in position to tap them, and he does hire help to do this for him. On a few occasions when he has had to tap a keg on his own he has had trouble with his back.

Q. Could you find any physical evidence of this trouble?

A. No. At this time it was noted that he had a fairly good range of motion in his back. He seemed to be well muscled. There was no back muscle spasm and there was no tenderness over the area of his fracture in the upper lumbar spine. There was a little pressure over the [14] intraspinous ligaments at the lumbo-sacral area, or at the junction of the lumbar spine and pelvis. His lower extremity motion tests and reflexes were all essentially negative.

Q. Did you take any X-rays at that time?

A. Yes, I think I did.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 7.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 8.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 9.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 10.)

A. The X-rays that were made on August 19, 1959, of Mr. Cunningham's back have been numbered 7, 8, 9 and 10. These are X-ray films made of the lumbar spine from various angles. The Exhibit marked Number 7 is a film made of the lumbar spine from the

(Deposition of Dr. Forrest L. Flashman.)

anterior-posterior direction. The films marked 8 and 9 are both lateral [15] views of the lumbar spine. Film Number 8 shows a little more the lower lumbar spine, and film Number 9 shows a little more of the upper lumbar spine, and they both show residual deformity of the body of the upper lumbar vertebra that was compressed, with possibly 25 or 30 per cent narrowing of the anterior margin, and they also show what we term hypertrophic or osteoarthritic over growth of the superior margin of the fourth lumbar vertebra, which spur was noted on the original films made of October, 1956, and which possibly is a little larger now than it was at that time. The film labeled Number 10 is a film of the lower lumbar spine, chiefly what we term the lumbosacral joint, which is about the area that he seemed to be having his low back trouble or discomfort at this time, and he reveals an essentially normal appearing lumbosacral joint, with a tendency toward a moderately increased sacral carrying angle. In other words, we ordinarily think of the back bone as being made of one block of bones setting on top of the other, and they set in a more or less upright position on the pelvis. Some people have a pelvis which has a somewhat backward curve to it; in other words, these type of people present more of a bustle than a person with an entirely upright spine, so that there is a little more spearing force where the weight of the body and the [16] spinal column sets on the pelvis.

Q. Is this the case with Mr. Cunningham?

A. He has a moderate tendency toward this type of carrying angle.

(Deposition of Dr. Forrest L. Flashman.)

Q. Is this traceable in any way to the compression fracture? A. I don't believe so.

A. And what is your prognosis for Mr. Cunningham?

A. Well, I think Mr. Cunningham will be able to continue to carry on as he has, that is, make a living and remain fairly happy with his back as long as he doesn't have any real heavy work to do with it.

Q. In your opinion, is he disabled from doing heavy work with it?

A. He is probably not disabled from doing real heavy work, although I am sure that if he did anything very heavy with it he would have to pay for it in pain and suffering over a period of the next few days or a week until he had relieved this back soreness that he would have. In other words, this is a back that just won't quite mechanically take all the stress and strain that occurred prior to his injury.

Q. In your opinion, is this condition traceable to the compression fracture as a result of this airplane accident?

A. This condition is traceable to the result sustained in [17] his airplane accident.

Q. In your opinion, will he be personally disabled?

A. Yes, I think so.

Q. Doctor, you mentioned the fact that there were some arthritic spurs on the vertebrae involved in this accident; did you—First of all, did you mention that?

A. I mentioned the fact that there was an arthritic spur, a fairly large one, on the body of the fourth lumbar vertebra, which had been present at the time the

(Deposition of Dr. Forrest L. Flashman.)

original films were made, but which now seemed to have increased a little in size.

Q. Now, what would this signify?

A. This may or may not signify anything, in that we expect a slow and natural increase in these hypertrophic changes. They are part of an aging process of a back.

Q. Would this have anything to do with the fracture in the aircraft accident?

A. I don't know.

Q. You could express no opinion on that, then?

A. I think I can, but it would have to be more of a generality. We feel that people that have degenerative changes in their spine, that develop these hypertrophic arthritic or wear-and-tear type of changes, have joints and bone structure that don't stand stress or strain quite as well as a back that doesn't have it, and whether or not an [18] injury per se can produce these would depend a little on the injury. We can definitely trace some of our hypertrophic degenerative changes and this bony spurring to single injuries. In Mr. Cunningham's case, this was present at the time that he had his injury and the injury may have produced a condition which would make this a little more symptomatically noticeable to the patient. In other words, people that do have arthritic changes or arthritic spurring in their back will often have a back made symptomatic by injury; in other words, often a severe injury may make a back that has degenerative changes and hypertrophic arthritic changes symptomatic that would probably not be symptomatic otherwise. In other words, we think that there

(Deposition of Dr. Forrest L. Flashman.)
is a little stiffening or limitation of motion in this type of back, and when motion is forced beyond that limit then the back hurts, and a chronic strain condition can persist as a result of that.

Q. Are you able to say whether this is the case with Mr. Cunningham or not, independently of any statements he may have made to you?

A. I have a feeling that Mr. Cunningham's residual condition now is a direct result of the severe injury that he had to his back. As far as trying to tie up this one hypertrophic spur that we see, I think it is immaterial. He [19] still is suffering from a chronic strain condition of low back brought on by his injury.

Q. I see. Now, are there any other arthritic changes evident in these X-rays?

A. No, not to any extent.

Q. I see. Do you know how old Mr. Cunningham is?

A. He was forty-nine when I first saw him in 1956.

Q. I see. Can you tell me how much you charged Mr. Cunningham for these various visits and treatments?

A. Mr. Cunningham's bill is $278.00. You may have that.

(Whereupon, a medical statement was marked for identification as Deposition Exhibit Number 11.)

Mr. Reynolds: Let the record show that a summary of Dr. Flashman's charges is marked 11 in the upper left-hand corner in pencil, and will be attached to this deposition as an exhibit.

(Deposition of Dr. Forrest L. Flashman.)

Q. Have you been paid these fees, sir?

A. No; I think there has been part payment paid on them.

Q. Just to review one thing a little bit; on the 26th of October, 1956, when you first saw Mr. Cunningham, he was in a cast which you changed for a brace; is that right? A. Yes.

Q. You advised him that he could dispense with the brace [20] in the daytime on the 2nd of January of 1957?

A. Yes—Correction; at nighttime.

Q. He could dispense with it at night, but had to keep it on in the daytime? A. That is right.

Q. And did you ever advise him when he could stop using the brace?

A. Yes; on February 12th of 1957, I advised him that he could start to leave his brace off during the daytime providing that he would wear it if there were going to be any back strain involved in anything he was doing.

Q. Now, when was he able to dispense with the brace entirely? A. I don't know.

Q. That would be up to him, then?

A. I advised him I would like to check him again in about two months, and the next time I saw him was in August.

Q. September 11th, I believe, was the date you gave, sir.

A. Is that right? In September of 1957.

Q. Now, with regard to the injuries, other than those to Mr. Cunningham's back, I believe you stated

(Deposition of Dr. Forrest L. Flashman.)

that they consisted of lacerations which were at that time sutured when you first saw him; is that right?

A. Yes.

Q. Could you describe those in a little bit more detail for us? [21]

A. The laceration that I treated was a laceration over the left eyebrow area, which had been sutured at the time of his accident, and from which I removed the sutures as it healed.

Q. What was the condition of that laceration at the time you saw it?

A. It was a healing laceration. It was clean and doing satisfactorily.

Q. Did you give any further treatment for that laceration or any other injuries that he had had?

A. No, I did not.

Q. That was the end of those?

A. Right. He had multiple contusions and bruises about his body and some areas of discoloration around his face and shoulders, but these areas required no treatment.

Mr. Reynolds: I believe you can question, Jack.

By Mr. Obenour:

Q. Your first contact with Mr. Cunningham was in effect a referral from the original work that was done at the time of the accident to a local doctor?

A. Yes. [22]

Q. And as a result of your X-rays at that occasion, marked X-rays 1 and 2, you made your diagnosis of this compression fracture; is that right, sir?

A. Yes.

(Deposition of Dr. Forrest L. Flashman.)

Q. On that occasion you noticed this arthritic spur on the fourth vertebra, and is that arthritic spur of the fourth vertebra above the point of compression, the compression fracture?

A. No; it is below, or, in other words, it is distal or toward the leg side of the fracture.

Q. And how far would it be from the point of the fracture to this fourth vertebra, or where the spur was?

A. Oh, in inches, possibly three to four.

Q. Three to four inches below the—

A. That is right.

Q. And then you saw him in November, December, and then in January, and that was to determine that the healing process was proceeding properly, I take it; is that right, sir? A. Yes.

Q. Now, during this time he was ambulatory, between October and February, he was ambulatory by means of this brace, and the limitations, then, according to your advice, was that there would be no lifting and no straining and not to bend forward? [23]

A. Correct.

Q. Then the healing had progressed sufficiently by February 12th where he could leave off the brace and wear it only when he was going to strain himself by lifting; is that correct, sir?

A. That is essentially correct. He was told he could start to discard his brace during the daytime.

Q. Was he working during this period of time?

A. I don't know just how much work he was doing. As I say, he operates a tavern, and he was spending time in the tavern as an owner and part operator, but he was hiring his work done.

(Deposition of Dr. Forrest L. Flashman.)

Q. And the X-ray taken in February, did that show that the fracture had healed then, the healing process was completed or not?

A. I don't believe that an X-ray will tell you whether or not a healing process is completed in four and a half or five months. Part of that is the judgment on the part of the doctor taking care of him as to how far he thinks bone healing has gone, and the X-ray merely outlines or is a shadow of the vertebral body which is fractured, and the fracture had remained stable; in other words, there had been no further compression during any of the healing time, so it was felt that it was probably solidified enough so that it could take a moderate amount [24] of movement without protection above a back brace.

Q. Would that be your opinion, that the healing had been completed by February?

A. No, I don't think it was completed by that time; I think it takes a good six months for a compression fracture to become healed well enough so that it can take a good deal of jarring and pushing around, again in a person of this age.

Q. And that would have been in March?

A. Possibly six weeks more, right.

Q. And on that basis you told him to come back in two months? A. In about two months.

Q. But he did not come back, then, until seven months later? A. That is correct.

Q. Now, your determination, then, is based upon an opinion of the healing from the comparative X-rays, if I may use that term; in other words, comparing one

(Deposition of Dr. Forrest L. Flashman.)

to another to see whether there has been any change, and then the age of the particular patient; is that right?

A. That is correct.

Q. To what degree is your determination based upon the statements of the patient?

A. Not to any extent in which the patient could sway my judgment so that I would pronounce him healed in two months rather than in six, and we don't expect a patient [25] with a compression fracture to have any real severe pain in the back or the area of their compression after a certain length of time after an accident. In other words, these fractures can be healing for a period of three or four months and not be causing any particular pain, particularly when the fractures are being protected by a form of partial immobilization.

Q. Well, you referred to tenderness and limitations of movement, which I assume you determined from physically viewing him and causing him to attempt to move and so forth at the time of his visit; is that right?

A. Only to a very limited extent. There is no attempt made to examine or determine a range of back motion while a fracture is healing, and I am always very careful to caution a patient not to attempt to bend the back, and particularly to flex it during that first six months' period after a compression fracture of a vertebral body.

Q. On the occasion of his visit in September, now, did he come to see you so that you could check his progress, or was there some other reason?

A. No; I think that his visit at that time was a further check on the status of his condition.

(Deposition of Dr. Forrest L. Flashman.)

Q. In other words, he simply had delayed an additional five months in coming back to have you examine the condition of his back? [26]

A. Yes.

Q. So, in that time his back had not bothered him sufficiently to cause him to come to see you as you originally directed him to?

A. I would not expect his back to bother him if he were to follow directions in avoiding back stresses and strains. At the time I saw him in September, he was still having trouble with his back, but nothing severe enough that had him frightened.

Q. The only time that he would have noticed any limitation on his activities would be the lifting of the full kegs and tapping the kegs at the tavern; is that right?

A. At this time I didn't ask him specifically about his kegs. He just made the statement he was unable to do any type of heavy lifting without his back hurting him, and also that his back still was sore and fatigued at the end of the day after being up and around all day.

Q. Then at this time, though, his complaint was at an area lower than the compression, rather than the area of the compression itself?

A. Well, at this time, in September of '57, it still seemed to be pretty much the whole lumbar spine, at least from the level of his fracture down to the lumbo-sacral joint, but there were no areas that were specifically tender to percussion. I could rap fairly firmly over the [27] fractured vertebra and he did not have pain. He had tenderness in the soft tissues and tender-

(Deposition of Dr. Forrest L. Flashman.)

ness in the intraspinous ligaments, but there was no longer any pain that one could produce by jarring this back.

Q. Maybe I misunderstood you. Did you make some reference to a complaint at the lower region rather than from the region of the compression fracture?

A. Yes; and that was made at the time of my examination in August of 1959.

Q. August of '59? A. Yes.

Q. And you say that this is a result of the compression fracture, this excessive tiredness or fatiguing at the lower back extremity, or—

A. That he had in September of 1957?

Q. Yes.

A. Yes.

Q. Well, this fatiguing at the—

A. His complaint that he has now of soreness, aching, and symptoms in the low back which he tends to localize at the lumbo-sacral level, which is the lower portion of our spine, is what I think are residuals of a rather severe back injury. The compression fracture was evidenced by X-ray of such injury, although in order to get a fracture like that the whole spine has to be put [28] under rather severe strain and, as is typical with most of these lumbar compression fractures the residuals of soreness and aching are usually at the lumbo-sacral junction after the original fractured vertebra has healed. The residual stress or strain symptoms continue to exist as a chronic strain type of thing.

Q. And this was reported to you in August of '59, rather than in September of '57?

(Deposition of Dr. Forrest L. Flashman.)

A. In September of '57, the whole, or at least two-thirds of the lumbar spine from the level of his fracture down was still sore, tender and with generalized aching and fatiguing. Several years later, in August of 1959, he no longer had complaints at the level of his fracture, which was the upper lumbar spine, but his complaints now seemed to be fairly well localized to the lower portion of the lumbar spine.

Q. The only way you can tell it, however, is by his reporting this condition to you; is that correct, sir?

A. It is not visible to X-ray. Yes, to a large extent.

Q. And you mentioned, I believe, symptomatic conditions that result from a back injury. Is that in effect that a person who has had such an injury is more conscious to feeling aches or fatiguing in the back because he has suffered the injury?

A. Yes, I think so. [29]

Q. And, in other words, this condition is induced, or rather claimed by the patient to exist more so from one who has had the injury, or is it something that simply any one of us who are not used to doing heavy work or lifting a keg would feel the next day but wouldn't attribute it to a back injury? Do I make myself clear?

A. Yes, I think you do, and I think you are probably correct in some of your statements, that particularly at Mr. Cunningham's age, and anyone that is over fifty or so that isn't doing heavy work, can produce backache by doing heavy work; on the other hand, people who have had severe back injuries with compression fractures, people who have had severe back injuries with

(Deposition of Dr. Forrest L. Flashman.)

compression fractures through the lumbar spine area, almost all have difficulty with residual complaints, which I think are chronic strain patterns from a severe injury. In other words, they have had a real severe strain or sprain through a back, or along with the X-ray a compression fracture, and the majority of my patients who have had these types of fractures continue to have difficulty with their low back.

Q. Well then, is it not a condition—not only Mr. Cunningham—but a condition that would be prevalent to an injury, or that a person would be much more conscious of any unusual pain responses from that area and that [30] they would attribute to the injury, or, in other words, they are much more conscious of it?

A. Yes; that is particularly true of the more severe injuries.

Q. When there may or may not actually be a reaction that would have resulted without the injury, as the former example of doing an undue amount of straining when you are not used to it?

A. I think that is entirely possible.

Q. So that, as far as you are able to say, the condition reported to you, well, you know what Mr Cunningham tells you his present condition is; is that right, sir? A. That is correct.

Q. And that condition may be no different than it would have been without the injury for a man of his age doing this excessive lifting of a heavy keg, as he is doing in his work? A. That could be.

Q. And the arthritic spur was not effected in this accident, in any event, in your opinion; is that right, sir?

(Deposition of Dr. Forrest L. Flashman.)

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Q. And that condition may be no different than it would have been without the injury for a man of his age doing this excessive lifting of a heavy keg, as he is doing in his work? A. That could be.

Q. And the arthritic spur was not effected in this accident, in any event, in your opinion; is that right, sir?

(Deposition of Dr. Forrest L. Flashman.)

A. I don't believe it was effected by any X-ray evidence that I have been able to see, and the increase in size of it I think can be attributed in part to natural progression of that type of lesion.

Q. Would a back with this condition not also be subject to [31] increasing limitations on the use of that back by the arthritic condition?

A. Backs that have a tremendous amount of this arthritic or degenerative change probably can become symptomatic through daily use. I don't think that the condition that Mr. Cunningham has in his back, which is a very localized arthritic spur, has much bearing one way or the other, and this back is not an arthritic back per se.

Q. Is this an indication of a condition that will continue to get worse as time goes on, or is it apt to remain pretty much static?

A. This is fairly well localized. The spurring will probably gradually increase in size over a period of years. I don't think that it will become any more symptomatic particularly.

Q. You don't believe these symptoms he is experiencing are attributable to the spur at the present time?

A. No, I don't believe so.

Q. And the only limitation, to your knowledge, that could in any way be attributable at this time to the accident would be the extreme lifting which he reported assuming that this condition did result from the accident and not from a condition that we had previously discussed of a person who is much more apt to be conscious of this feeling, or assuming it is from the accident, the

(Deposition of Dr. Forrest L. Flashman.)

ultimate [32] effect that he has had on his back would be a limitation against extremely heavy lifting?

A. I think that is pretty much true. I think Mr. Cunningham has sustained what we could term permanent partial disability of this back as the result of his injury, so that he has a back which is mechanically not as able to take stress and strains as a normal back would be. I think in Mr. Cunningham's case that we could place a functional limitation from this type of injury to about 25 per cent limitation of this back now to perform functionally the way you would ordinarily expect it to at this age. In other words, this man has a back that he will not be able to subject to excessive stresses or strains, which not only include lifting a heavy keg in his type of work, but includes any type of other activity he might want to do, such as horseback riding, or a hunting trip, or carrying out a deer, or working around his yard, cutting and chopping wood and so forth.

Q. If he were to do so, it would result in fatigue?

A. Yes.

Q. Wouldn't this condition of fatigue result in any other fifty-year-old man doing a type of thing he wasn't used to?

A. I think it would to a certain extent. [33]

Mr. Obenour: I believe that is all.

Redirect Examination

By Mr. Reynolds:

Q. If Mr. Cunningham had not had this injury to his back, would the strains which Mr. Obenour was

(Deposition of Dr. Forrest L. Flashman.)

talking about affect him to as large an extent as they apparently do? A. I don't think so.

Q. Is that your opinion, Doctor? A. Yes.

Q. Doctor, I want to go into one thing which perhaps I forgot. Did you refer him to any other physicians or medical people, beyond the brace, for treatment of this particular injury?

A. I don't believe I referred him to any type of physiotherapy or any other supportive therapy.

Q. Now, Doctor, on cross-examination Mr. Obenour brought out the fact that Mr. Cunningham had delayed from February 12th, 1957, until September 11th, 1957, in seeing you; if he had seen you, would his condition be any better as a result of it?

A. No, I don't think so.

Mr. Reynolds: I don't think I have any more, Jack. [34]

Recross-Examination

By Mr. Obenour:

Q. Was his examination here in August for the purpose of determining his present condition in regard to this suit, rather than from any other complaints he had?

A. Well, yes, the first time I saw him in August was for determination of his present condition. I saw him a week or so after that, at which time he came in with a very acute back pain. He was really in a lot of trouble. He had been watering his yard and bent over to pull out a root and had sustained a very severe catch of pain in his low back, with pain that radiated down into his left groin and left leg area. For this

(Deposition of Dr. Forrest L. Flashman.)

I gave him medication for relief of pain and spasm, and advised that he get physical therapy treatment, and he was followed here for several weeks. On September 8th of 1957, he broke out with a neuritic reaction which we call herpes, which is a very painful nerve inflammation, which followed the course of his pain from his low back around the groin, around the hip into the left groin, and this condition persisted for a week or two and now has gradually let up so that the only residuals of these herpes, or shingle blisters as we call them, are the brownish pock marks or scabs, somewhat similar to what you see following [35] chicken pox. So this man has had considerable difficulty since his August, 1959, examination. Just how much the strain of pulling this root out of the yard had to do with the subsequent onset of his very painful shingles, I can't tell you, but I am under the impression he has had two very severe attacks of back difficulty since the examination in August. He is still under treatment at present.

Q. With you? A. Yes.

Q. What is this herpes condition? A type of shingles, you say? A. Yes.

Q. What causes that?

A. We think it is a virus infection, and along the same type of thing that causes chicken pox and fever blisters.

Q. Not attributable to the aftereffects of the injury. then?

A. I don't believe so.

Mr. Obenour: I believe that is all.

Further Redirect Examination

By Mr. Reynolds:

Q. Now, Doctor, I understood you to say that herpes or [36] popularly known, I believe, as shingles; is that correct? A. Correct.

Q. Isn't it a fact that shingles usually affected the upper part of the abdomen up around the chest area?

A. I think they are probably a little more commonly seen on the upper chest area, although they will follow the course of any nerve, and we see them across the forehead, across the cheek, down a leg, down an arm, apparently wherever this inflammatory neuritic process has taken hold.

Q. Now, is it possible that the residual weakness of Mr. Cunningham's back, induced by the compression fracture, had something to do with this onset of shingles?

A. I don't believe so. I don't think that trauma per se is a logical factor in the production of shingles; and to answer the second part of your question as to whether or not a previous weakness may predispose to it, I don't know. I rather doubt it.

Q. Actually, not very much is known about shingles; would it be correct to say that, Doctor? It is something that the medical profession doesn't completely understand?

A. I think so. It just seems to pop up at the oddest times.

Mr. Reynolds: I believe that is all.

Mr. Obenour: That is all, Doctor.

(Witness excused.) [37]

Certificate

State of Washington, County of Pierce—ss.

I, Eugene E. Barker, Notary Public in and for the State of Washington, residing at Tacoma in said County and State, do hereby certify:

That the annexed and foregoing deposition upon oral examination of Dr. Forrest L. Flashman, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting under my direction; said deposition upon oral examination being taken at Seattle, Washington, on September 22nd, 1959, being completed on said day;

I further certify that said witness and the parties hereto waived the reading and signing by said witness of his deposition after the same was fully transcribed;

I further certify that all objections made at the time of said examination, to my qualifications or to the manner of taking said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to [38] said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

I further certify that said deposition upon oral examination, as above transcribed, is a full, true and cor-

rect transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am herewith securely sealing said deposition in an envelope, with the title of the above Causes thereon, and marked, "Deposition upon Oral Examination of Dr. Forrest L. Flashman," and promptly delivering the same to the Clerk of the aforementioned Court;

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 29th day of September, 1959.

[Seal] /s/ EUGENE E. BARKER,
Notary Public in and for the State of Washington, residing at Tacoma. [39]

In The United States District Court
For The District of Arizona

Civ.-2962-Phx.
Civ.-2963-Phx.
(Consolidated)

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DEPOSITION UPON ORAL EXAMINATION OF DR. R. E. RAMAKER

Be It Remembered, That the deposition upon oral examination of Dr. R. E. Ramaker was taken at the instance of the Plaintiffs herein in the above-entitled and numbered Causes on the 22nd day of September, 1959, at the hour of 9:15 a.m., at the office of Dr. R. E. Ramaker, Stimson Building, Seattle, Washington, before Eugene E. Barker, Official Court Reporter and a Notary Public in and for the State of Washington, residing at Tacoma. [1]*

*Page number appearing at bottom of Original Deposition.

Appearances: The Plaintiffs herein being represented by Robert M. Reynolds, of the firm of Metzger, Blair & Garner;

The Defendant herein being represented by John S. Obenour, Jr., Assistant District Attorney.

Whereupon, the following proceedings were had and done, and testimony taken, to-wit: [2]

Mr. Reynolds: Let the record show that this is taken pursuant to a continuance of a deposition which was originally started on August 7, 1959, and pursuant to the same stipulations as that deposition, of course.

Is that satisfactory with you?

Mr. Obenour: Yes.

Whereupon,

DR. R. E. RAMAKER,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Reynolds:

Q. Doctor, I would like to go in for a moment, if I could, a little bit further concerning your qualifications as a dentist.

Mr. Obenour: For the record, we would stipulate as to his qualifications, and object to this as being repetitious.

Mr. Reynolds: Well, I just want to enlarge a little bit upon one item.

Q. You said you had done some work under a Guggenheim Foundation grant; is that correct? [3]

A. That is right.

(Deposition of Dr. R. E. Ramaker.)

Q. What kind of work was that, and about how long did it involve?

A. Well, they backed me up to a certain extent financially for seven years.

Q. Was this in connection with dental research of one kind or another? A. Yes, sir.

Q. Can you summarize very briefly what that research involved?

A. Well, it was an attempt to locate the primary cause of the majority of malformations of the mouth and nose of children. That is it.

Q. Now, Doctor, during your prior examination here we continued it for the reason that you wanted to re-examine Mr. Price; have you done so?

A. Yes, sir.

Q. Can you tell us if the distortion which you thought had probably occurred, according to your former testimony because of the fracture and the making of the new dentures, has occurred?

A. Yes, it has.

Q. What is his present condition, then, insofar as his dentures are concerned?

A. You mean as far as the dentures are concerned? [4]

Q. Yes. Well, I mean as far as this overbite that you mentioned before is concerned.

A. Well, he has a diminution of the mandible, and a bite closure of not less than 8 millimeters in the forward positions of the mandible in its entirety.

Q. And this is due to the fracture?

A. The diminution of the mandible is due to the

(Deposition of Dr. R. E. Ramaker.)

fracture. The closure that he has had is due approximately 80 per cent to—I will have to change that a bit. Approximately 80 per cent of the closure is due to the accident, to the fracture; the other 20 per cent would be just normal closure.

Q. Which would occur in anyone?

A. Which could occur in anyone, yes, sir.

Q. Now, Doctor, what corrective treatment, if any would you advise for this condition?

A. There is only one treatment, and that would be to open the bite so that the jaws would not come together in their present position.

Q. And how would you advise that this be treated?

A. Well, if Mr. Price responds nicely to new dentures, it could all be handled just by the construction of one set of dentures and opening the bite.

Q. What would the cost of that be, approximately?

A. If we make just the one set of dentures for him, it would [5] be $250.00; however, if that does not fully compensate, it might be necessary to again open the bite a little further, providing he could not tolerate the complete 8 millimeter opening at this time, and then that would be done by a conversion of these new dentures, then, into newer dentures, which would be $100.00.

Q. In other words, that would be a $350.00 total under the second alternative?

A. Yes; if it had to be done.

Q. Now, Doctor, have there been any other effects than simply a distortion of bite from this—

A. Yes; he is losing hearing.

(Deposition of Dr. R. E. Ramaker.)

Q. Is this likely to continue? A. Yes, sir.

Q. And this is caused by the closure of 8 millimeters which you mentioned? A. Yes, it is.

Q. Is a closure of 8 millimeters abnormal?

A. Very abnormal.

Q. Is there anything which can be done about the impairment of hearing?

A. To reclaim, no, sir, but to maintain where it is now the dentures would prevent any further loss of hearing.

Q. Is there any way that you can measure that loss of hearing? [6]

A. I have nothing to do that with, no, sir.

Mr. Reynolds: I believe that is all.

You may question, Mr. Obenour.

Cross-Examination

By Mr. Obenour:

Q. You say you have nothing to measure hearing with, Doctor? A. No.

Q. I didn't know he was losing his hearing. How do you know?

A. Well, I can tell you that. When I talked to the man, I kept my voice at a certain tone most of the time, then I would drop it a little bit, and he would say, "What did you say?" Then I would repeat the same thing, and he got it again. Now, another thing, Mr. Price is rather reluctant to admit that he is losing any hearing, but his wife, who was here with him the last time I examined him, insists that he is losing his hearing; that she has to talk to him a lot louder than she used to.

(Deposition of Dr. R. E. Ramaker.)

Q. Then your information as to his losing his hearing is really what his wife tells you, rather than—

A. Well, that part is true in part, yes, sir, except in my talking to him I tried to be reasonably fair about raising and lowering the voice. [7]

Q. Loss of hearing is also one of the conditions resulting from increased age, is it not?

A. Not necessarily.

Q. Is it not also one of the things that result along with losing your teeth and losing your eyesight, a diminution of hearing?

A. Yes, sir. I allowed 20 per cent of the loss of hearing to normal atrophy of the surrounding tissues that support the dentures.

Q. That is an estimate, that 20 per cent is due to normal conditions? A. Yes, sir.

Q. Have you ever done any work with the loss of hearing? A. Oh, yes.

Q. Have you done any work with the loss of hearing due to flying? A. No, sir.

Q. Are you familiar with the conditions of—

A. Yes, sir.

Q. (Continuing)—extensive flying, the noise of the engine causing a diminution of hearing?

A. Yes, sir.

Q. This all results from Mr. Price's flying, does it not?

A. You mean the loss of hearing?

Q. The accident. We are talking about a flying accident. [8]

(Deposition of Dr. R. E. Ramaker.)

A. Well, I think it is due to the accident myself. I cannot be quoted definitely on his occupation, however.

Q. Yes, sir. But the accident resulted from flying?

A. Well, apparently so.

Q. And that is what we are talking about?

A. Yes.

Q. Would you be able to say what percentage of this diminution of hearing resulted from the flying?

(Whereupon, there was an off-the-record discussion.)

A. I could not.

Q. And from your own experience, then, while you are willing to accept 20 per cent diminution of hearing by normal conditions, you are just assuming that there is a diminution of hearing because of what the wife said and by your test of raising your voice?

A. (Witness nods affirmatively.)

Q. You are not able to say that it in part is not a result of this flying in itself?

A. Well, I couldn't say that definitely, but in comparing patients where I have treated them here for loss of hearing that have never done any flying, there have been a lot of them.

Q. Yes, sir. But have you ever run across the loss of [9] hearing from flying?

A. No, sir, not to my knowledge.

Q. Well, I for one can say it happens. Now—

Mr. Reynolds: Well, Jack, I am sure you know more about that than I do, and—

The Witness: Well, I know it happens, but it hasn't come under any work I have done here.

(Deposition of Dr. R. E. Ramaker.)

Q. Then you would not be able to say that part of this condition of Mr. Price doesn't come from the fact that he has been flying?

Mr. Reynolds: Well, of course, this is all subject to the objection that as far as I know nobody has established that there can be any loss of hearing from flying yet.

(Whereupon, there was an off-the-record discussion.)

Q. There are many other things that can cause a loss of hearing, are there not?

A. Sure; traumatic conditions.

Q. Did you make any examination for the determination of any other causes for the loss of hearing?

A. No, nothing further. The only thing I did was took the measurements on the man.

Q. When you say "closure," I take it that is a difference [10] in space between the upper and lower teeth?

A. Yes. We have closures that I treat right along. Generally they run, oh, 2 or 3 millimeters.

Q. The injury was on the left lower—

A. Both sides.

Q. Well, the break itself, though, was on the left lower jaw, if I recall; is that right?

A. No; I think he had one over in here (Indicating). I did see the X-rays long ago, but I believe that McIntyre's testimony showed two breaks; didn't it?

Q. All right. My recollection was that you didn't recall which side it was.

A. No.

(Deposition of Dr. R. E. Ramaker.)

Mr. Reynolds: Well, I think McIntyre's testimony is that—Do you have a copy of his deposition, Jack?

Mr. Obenour: No, I don't.

Mr. Reynolds: I do.

Mr. Obenour: My notes show there was a fracture of the left side of the lower jaw from McIntyre.

Mr. Reynolds: I believe that is right, yes. Dr. McIntyre's testimony is that he had inter-oral lacerations to the retro-molar area on both sides, and a sub-condylar fracture with minimal displacement below the left mandible condyle. [11]

The Witness: That would be right here (Indicating).

Q. Now, when that healed, well, this diminution you are speaking of, as I understand it, it means that the jaw bone in effect would contract? A. Yes, sir.

Q. And that in turn, then, by reason of the present dentures, it would cause the juncture of the lower jaw to affect the hearing; is that the condition?

A. Well, not exactly that, no, sir. It is the fracture and the diminution of the mandible that caused a closure a unilateral closure in that event, and any closure of the mandible, forcing the mandible forward in a position forward from normal, well, as that does that, the closure increases and the pressure of the condyle into the glenoid fossa becomes more extreme, which in turn does block the hearing.

Q. Then, as I understand it, the closure was 80 per cent due to the accident and 20 per cent normal?

A. Well, I am just judging that, sir, in connection with the average patient that I see here.

Q. I see. So that in normal conditions there is a certain degree of change in closure that results—

(Deposition of Dr. R. E. Ramaker.)

A. There is a difference in the closure there, because that closure in the average patient, where no accident has [12] occurred, is due to trauma, to the fact that the dentures settle up and the lower settles down, and as it settles the jaw closes and the mandible comes forward.

Q. Yes, sir. But in normal conditions, if I understand you, this same condition results to a lesser degree?

A. Yes, sir. That is the 20 per cent I had there.

Q. Yes, sir. And when you say to open the bite, it simply means that it is changing the dentures so that they fit properly for the present condition of the jaw and to release the pressure to which you referred?

A. Opening the bite means to bring it back to as close to normal as you can.

Q. By changing the dentures?

A. The dentures, yes, sir.

Q. And that would involve one set of dentures, or at the most a second set, for a total of $350.00?

A. Yes. An upper and lower set of dentures, the fee would be $250.00, and then if the bite would have to be opened a little bit more, providing you couldn't open it all at one time, then instead of making a new set of dentures you convert the old into a new set of dentures without the full cost.

Q. At the time that you made these dentures—You made them a year ago?

A. December, 1956. [13]

Q. December of '56. At that time you made the dentures for a normal closure; is that correct?

A. I opened the bite at that time 3 millimeters on him.

(Deposition of Dr. R. E. Ramaker.)

Q. And then this diminution has been a gradual transition in the ensuing two years and nine months?

A. Yes, sir.

Q. And the hearing would be affected only at the juncture when the diminution of the mandible would increase this pressure in during this time; is that right, during this intervening two years and nine months?

A. Yes, sir.

Q. This would be a gradual transition, I take it?

A. Yes; normally, it is gradual, yes, sir.

Q. So that for the first year and a half or some such there had been no effect upon the hearing until the healing process resulted in this change of bite and increased pressure?

A. As I recall—You are right—As I recall, Mr. Price had some lower front teeth. I never saw him with any teeth, however. If he did have any teeth in his mouth of his own, even with an upper denture, it would prevent a considerable closure because these are constant down here.

Q. You know nothing about any history of his hearing, then, I take it, do you, Doctor?

A. No; only what he told me. His hearing had always been [14] all right, he told me that, but then that doesn't answer the question.

Q. And your determination was from the manner in which you spoke to him, and that was—

A. Yes.

Q. And information given to you by his wife?

A. That is right.

Q. And you are, I believe, a denture specialist, rather than— A. That is all I do.

(Deposition of Dr. R. E. Ramaker.)

Mr. Obenour: We can move to strike the Doctor's testimony in regard to the hearing, being based on speculation and hearsay, and not within the scope of his experience as an expert, and that is all.

Mr. Reynolds: Well, you can certainly raise the objection; however, I don't think it is justified.

Redirect Examination

By Mr. Reynolds:

Q. Doctor, you stated during the examination by Mr. Obenour, I believe, that you had taken some measurement in connection with his closure of 8 millimeters, which you mentioned. Now, would those measurements have anything [15] to do with this pressure in the ear area which you mentioned from the closure?

A. Well, I simply take the normal measurement, which is 40 millimeters normally from here to this crease down here (Indicating).

Mr. Reynolds: Let the record show that that is from the base of the Doctor's nose to his—

The Witness: Crease in the lower lip.

Mr. Reynolds: Just below the lower lip, I think.

A. Right here (Indicating). We all have it, and that is very accurate, and 40 millimeters is normal, and when a closure begins you measure that as this closes together here (Indicating), and, in other words, this measurement from here to here again is a diminution there, which he has of 8 millimeters.

Q. In normal people, if there is a closure of the mandible of 8 millimeters, would that affect their hearing?

(Deposition of Dr. R. E. Ramaker.)

A. Oh, yes, yes, sir, if there is an 8 millimeter closure, yes, good gosh, yes.

Mr. Reynolds: I have no further questions.

Mr. Obenour: I don't, either.

(Witness excused.) [16]

Certificate

State of Washington, County of Pierce—ss.

I, Eugene E. Barker, Notary Public in and for the State of Washington, residing at Tacoma in said County and State, do hereby certify:

That the annexed and foregoing deposition upon oral examination of Dr. R. E. Ramaker, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting under my direction; said deposition upon oral examination being taken at Seattle, Washington, on September 22nd, 1959, being completed on said day;

I further certify that said witness and the parties hereto waived the reading and signing by said witness of his deposition after the same was fully transcribed;

I further certify that all objections made at the time of said examination, to my qualifications or to the manner of taking said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to [17] said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

I further certify that said deposition upon oral examination, as above transcribed, is a full, true and correct transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am herewith securely sealing said deposition in an envelope, with the title of the above Causes thereon, and marked, "Deposition upon Oral Examination of Dr. R. E. Ramaker," and promptly delivering the same to the Clerk of the aforementioned Court;

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 29th day of September, 1959.

[Seal]

/s/ EUGENE E. BARKER,
Notary Public in and for the State of Washington, residing at Tacoma. [18]

In the United States District Court
For the District of Arizona

No. Civ. 2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER TO INTERROGATORIES

In response to interrogatories heretofore propounded to them by the defendant, United States of America, plaintiffs being first duly sworn, say as follows:

Interrogatory No. 1

The answer to Interrogatory No. 1 is as follows: The residence address of the plaintiffs, William Carl Cunningham and his wife, is and since before October, 1953, has been Vashon Island, King County, Washington.

Interrogatory No. 2

In answer to Interrogatory No. 2 plaintiffs state that the deposition, with a representative of the defendant present, was completed on September 22, 1959, of Dr. Forrest L. Flashman, of Seattle, Washington, with regard to injuries sustained by William Carl Cunningham, to his back, in the accident which is the subject of this action. Reference is made to said deposition for details concerning the injuries to said back. In addition thereto plaintiffs state that the plaintiff, William Carl Cunningham, received numerous lacerations of the face, most serious of which was a cut above the left eye, and numerous bruises and contusions.

Interrogatory No. 3

With regard to the injuries to plaintiff's back, reference is made to the deposition of Dr. Flashman, hereinabove referred to. In brief summary plaintiff states that he was in a body cast from October 18, to November 1, 1956, in an Abbot Hypertensive Brace from approximately November 1, 1956, to approximately January 2, 1957, continuously; in the brace from approximately January 2, 1957 to February 12, 1957, except when in bed at night; and was required to use said brace for steadily decreasing periods from and after February 12, 1957, until sometime in the summer of 1957. That residual injuries to said back resulted in permanent disability of approximately thirty percent (30%) of the normal use of said back. Specifically the injuries sustained to said back were compression fracture of the second lumbar vertebra, with concurrent severe strain to the entire lumbar spinal column.

With regard to the lacerations to plaintiff's face, the numerous sutures taken therein were removed by Dr. Flashman. No great or permanent disability resulted therefrom, except that plaintiff has a scar, approximately the size of a dime, in the inner edge of his left eyebrow, which scar is permanent in nature.

Interrogatory No. 4

Plaintiff, William Carl Cunningham, was confined to the Memorial Hospital in Phoenix, Arizona, for the period from October 18, 1956 until October 22, 1956.

Interrogatories No. 5 and No. 6

While plaintiff, William Carl Cunningham, was not confined to his home as a result of said accident, as stated hereinabove, he was in a body cast or hyperten-

sive brace continuously until approximately January 2, 1957, and for gradually decreasing periods of time thereafter, and his physical activities were severely impaired as a result thereof. Because of the residual injuries to plaintiff's back his physical activities were impaired; he can do no heavy lifting, which is necessary in his business and cannot perform ordinary and necessary work at his home, nor engage in many of the activities which he could before the accident. This disability is expected to be permanent.

Interrogatory No. 7

Plaintiff, William Carl Cunningham, was treated by Dr. Stovall and Dr. Maresca in Phoenix, Arizona, from October 18, 1956 until October 22, 1956, while in the hospital in Phoenix, and has been treated by Dr. Flashman of Seattle, Washington since October 22, 1956. For the number of visits and treatments by Dr. Flashman, reference is made to his deposition hereinabove referred to.

Plaintiff further states that his spectacles were broken in the accident and he obtained new spectacles from Dr. Robert P. Jonas of Vashon Island, King County, Washington. The charges of each doctor incurred are as follows:

Dr. Stovall (Phoenix, Arizona)	$ 250.00
Dr. Maresca (Phoenix, Arizona)	50.00
Dr. Flashman (Seattle, Washington)	278.00
Dr. Jonas (Spectacles)	40.30
Total	$ 618.30

Interrogatory No. 8

Paid to Memorial Hospital (Phoenix, Arizona)	$ 228.05

Interrogatory No. 9

Paid to Phoenix Ambulance Service (Emergency Service in Phoenix)	$ 55.53
Charles C. Cullen Co., 8th and Olive Way, Seattle, Washington (Abbot Hypertension Brace, ordered by Dr. Flashman)	$ 67.17
	$ 122.70

Interrogatories No. 10 through 14

Plaintiff, William Carl Cunningham, was self-employed at the time of the accident, being the owner and operator of the Vashon Island Tavern. Plaintiff, William Carl Cunningham was required to be absent from said business, in a large part, until the spring of 1957, and because of the residual injuries to his back has been unable to engage in the operation of said business to the extent he was before the time of the accident, and as a result thereof it has been, and is necessary for him to hire additional employees, and to increase the time spent of employees who were formerly part-time employees, to the extent that he has and will continue permanently to pay said employees approximately $1500.00 per year in additional wages. Plaintiff, William Carl Cunningham is presently 51 years old and will reach the age of 52 years in October, 1959. Said plaintiff expects to own and operate said tavern for an indefinite period of time in the future. Plaintiff has filed Federal Income Tax Returns for each of five years preceding the accident, and for all years since, with the Director of Internal Revenue at Tacoma, Washington.

Interrogatory No. 15

Plaintiff's itinerary on the day of the accident, to-wit, October 18, 1956, was as follows:

Left San Angelo, Texas, at 10:07 A.M.; arrived Wink, Texas, at 11:37 A.M.;

Left Wink, Texas, at 12:40 P.M.; arrived at El Paso, Texas, at 2:10 P.M.

Left El Paso, Texas, at 3:07 P.M.

Interrogatory No. 16

No civil or criminal action has been instituted against either of the undersigned plaintiffs as a result of the aircraft accident on October 18, 1956.

Interrogatory No. 17

Other than the instant case no civil action has been instituted by either of the plaintiffs as a result of the aircraft accident of October 18, 1956.

/s/ WILLIAM CARL CUNNINGHAM.

Subscribed and sworn to before me this 25th day of September, 1959.

/s/ CHARLES H. LAW,

[Seal] Notary Public in and for the State of Washington, residing at Vashon.

My Commission expires Sept. 24, 1960.

/s/ VERA MAE CUNNINGHAM.

Subscribed and sworn to before me this 25th day of September, 1959.

/s/ CHARLES H. LAW,

[Seal] Notary Public in and for the State of Washington, residing at Vashon.

My Commission expires Sept. 24, 1960.

[Endorsed]: Filed Oct. 2, 1959.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Monday, Oct. 5, 1959, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix

Civ-2963 Phoenix

These cases are called for pre-trial conference at this time. Wm. E. Eubank, Esq., Assistant United States Attorney, is present for the Government. Virginia Hash, Esq. and Edgar Hash, Esq. appear as counsel for the plaintiffs.

Counsel for the plaintiffs move for continuance on ground they have been advised plaintiffs will be unable to attend trial.

It Is Ordered that further pre-trial conference be dispensed with at this time and that any further proceedings herein be continued until time set for trial October 6, 1959 at ten o'clock a.m.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Tuesday, Oct. 6, 1959, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District. Judge, presiding.

Civ-2962 Phoenix

Civ-2963 Phoenix

These cases come on regularly for trial this day. Virginia Hash, Esq., and Edgar Hash, Esq., appear for the plaintiffs. Wm. E. Eubank, Esq., Assistant United States Attorney appears for the Government.

Said counsel for plaintiffs now move for leave to withdraw as counsel for both plaintiffs, neither of whom is present.

Counsel for the Government announces ready for trial.

It Is Ordered that Virginia Hash and Edgar Hash are allowed to withdraw as counsel for the plaintiffs, and

It Is Ordered that each of these cases, Civ-2962 Phoenix and Civ-2963 Phoenix be, and hereby is dismissed.

(docketed 10-6-59)

District Court of the United States
District of Arizona

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OF COSTS AND DISBURSEMENTS

Disbursements

Marshal's Fees	$ 15.40
Clerk's Fees	
Reporter's Fees (Depositions)	58.35
Docket Fee	20.00
Examiner's Fees	
Witness Fees	
Costs incident to taking of depositions	10.20
Total	$103.95

United States of America, District of Arizona—ss.

William E. Eubank, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause, and that

the services charged therein have been actually and necessarily performed as therein stated.

/s/ WILLIAM E. EUBANK.

Costs taxed as claimed in the sum of $103.95 on Oct. 19, 1959 and entered in J. D.

/s/ By MELVIN F. LARSON,
Deputy Clerk

Subscribed and sworn to, before me, this 16th day of October, A.D. 1959.

/s/ KATHERINE CLARK,
[Seal] Deputy Clerk, United States District Court, District of Arizona.

[Endorsed]: Filed Oct. 16, 1959.

District Court of the United States
District of Arizona

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OF COSTS AND DISBURSEMENTS

Disbursements

Marshal's Fees ..... $ 15.40

Clerk's Fees .....

Reporter's Fees (Depositions)	62.35
Docket Fee	20.00
Examiner's Fees	
Witness Fees	12.00
Costs incident to taking of depositions	10.20
Total	$119.95

United States of America, District of Arizona—ss.

William E. Eubank, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

/s/ WILLIAM E. EUBANK.

Costs taxed as claimed in the sum of $119.95 on Oct. 19, 1959 and entered in J. D.

/s/ By MELVIN F. LARSON,
Deputy Clerk.

Subscribed and sworn to, before me, this 16th day of October, A.D. 1959.

/s/ KATHERINE CLARK,
[Seal] Deputy Clerk, United States District Court, District of Arizona.

[Endorsed]: Filed Oct. 16, 1959.

In the United States District Court
For the District of Arizona

No. Civ. 2962 Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. Civ. 2963 Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM IN OPPOSITION TO THE MOTION UNDER RULE 60

Comes Now defendant under Rule 9, Rules of this Court, and moves the Court to deny the motion filed herein by Greive and Law under Rule 60 for the following reasons:

A. Former plaintiffs' attorney has not complied with Rule 1 of this Court and is not an attorney of this Federal Bar, consequently the motion should be denied.

B. Former plaintiffs' attorney has not complied with Rule 9 of this Court and has failed to support his

motion with a brief or memorandum, consequently the motion should be denied.

/s/ JACK D. H. HAYS,
United States Attorney,

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 31, 1959.

[Title of District Court and Cause.]

MOTION FOR SECURITY OF COSTS and NOTICE

Comes Now the defendant and represents the following to the Court:

1. The above captioned matters came on regularly for trial on October 8, 1959; when the cause was called for trial the plaintiffs were not prepared to try the case; defendant, however, was ready to defend the case.

2. Because of the foregoing circumstances, the Court dismissed plaintiffs' action for want of prosecution and costs were awarded defendant.

3. Costs awarded defendant against William Carl Cunningham and Vera Mae Cunningham were in the sum of $103.95; costs awarded defendant against Glenn A. Price and Jane Doe Price were in the sum of $119.95.

4. Plaintiffs were notified of cost award by teletype, dated October 16, 1959, addressed to Mr. Robert M. Reynolds, c/o Metzger, Blair and Gardner, Attor-

neys at Law, Tacoma Building, Tacoma 2, Washington; no reply has been received to this date and said costs are still unsatisfied.

5. Plaintiffs have now improperly filed an unsupported motion under Rule 60, Federal Rules of Civil Procedure, with this Court.

Wherefore, the government prays that the Court require the plaintiffs to post a security bond for defendant's costs in the sum of $500.00, or cash, with the Clerk of this Court within twenty days hereof and prior to any consideration by the Court of any motion on behalf of the plaintiffs.

JACK D. H. HAYS,
United States Attorney.
/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney.

NOTICE

To: Messrs. Greive and Law, Attorneys for Plaintiffs, 4456 California Avenue, Seattle 16, Washington.

Please Take Notice that the United States will cause the foregoing Motion to come on for hearing before the United States District Court, United States Courthouse, Phoenix, Arizona, on January 18, 1960, at 10:00 a. m. in the forenoon, or as soon thereafter as counsel for the government can be heard.

JACK D. H. HAYS,
United States Attorney,
/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 6, 1960.

[Title of District Court and Cause.]

NOTICE

To: R. R. Bob Greive, Attorney for Plaintiffs herein.

Please Take Notice that defendant will cause the following Motions to be heard before the Court on Monday, February 8, 1960, in the United States District Court for the District of Arizona, United States Courthouse, Phoenix, Arizona, at 10:00 a. m., or as soon thereafter as counsel may be heard:

Plaintiffs' Motion to Vacate Judgment under Rule 60 and Defendant's Motion for Security of Costs.

Dated this 25 day of January, 1960.

JACK D. H. HAYS,
United States Attorney,

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 25, 1960.

[Title of District Court and Cause.]

SATISFACTION OF MEMORANDUM OF COSTS

The costs in the above-entitled cases having been paid, the Clerk of the United States District Court for the District of Arizona is hereby authorized and

empowered to satisfy the Memorandum of Costs filed in the above-entitled cases.

JACK D. H. HAYS,
United States Attorney,

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney.

Dated this 25 day of January, 1960.

[Endorsed]: Filed Jan. 25, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Monday, Feb. 8, 1960, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix
Civ-2963 Phoenix

Plaintiffs' Motion to Vacate Judgment pursuant to Rule 20 and Defendants' Motion for Security of Costs are called for hearing this day. William E. Eubank, Esq., Assistant United States Attorney, appears for the Government. Robert Greive, Esq. appears for plaintiffs. On motion of Robert Grieve, Esq.

It Is Ordered that Herbert Mallamo, Esq. be entered as associate counsel for the plaintiffs.

Said Motion to Vacate Judgment is argued by respective counsel.

It Is Ordered the record show said motions are submitted.

United States District Court
District of Arizona

Phoenix Division

Consolidated Cases
No. Civ-2962-Phx

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. Civ-2963-Phx

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO OPEN AND VACATE JUDGMENT

Come Now the plaintiffs jointly and individually and offer the court authorities in support of their joint motion to open, set aside, and vacate judgment under Rule 60, Federal Rules of Civil Procedure, as follows:

(1) Does the Court Have Inherent Power to Open and Vacate a Judgment?

(2) Does the Court Have Power to Open and Vacate an Improvident or Premature Judgment?

(3) Does a Meritorious Claim Affect the Court's Power to Open and Vacate Judgment?

Introductory Facts

The claimant-petitioners were previously in court on the date of trial, as shown by affidavits annexed hereto by reference. They were unable to pursue their action, and judgment was entered (or terms imposed) against them for failure to prosecute their claim against the defendant. They have since retained present counsel, contacted witnesses (see attached affidavits) and this is the first opportunity to present the clear facts before the court in an attempt to reinstate their claim of negligence against the defendant, under Rule 60, Federal Rules of Civil Procedure.

The claimant-petitioners have satisfied the terms imposed upon them, entitled "costs," and offer a bond for security for costs as a part of their showing of good faith, in the sum of five hundred dollars, as per request of counsel for the defendant. They respectfully submit that they have a justiciable claims as alleged in their pleadings, and that through mistake, excusable neglect, improvidence not of their own making, and unavoidable casualty, they were deprived of having their day in court whereby their meritorious claim should have been pursued to judgment against the defendant.

I. Does the Court Have Inherent Power to Open and Vacate a Judgment?

Generally, courts have inherent power to control, amend, and vacate their judgments under proper circumstances, although statutes do limit the power occasion-

ally. In the absence of a statute to the contrary, courts, under proper circumstances, may control, amend, open, and vacate their own judgments, Illinois Printing Co. v. Electric Shovel Coal Corp., 20 F. Supp. 181; Petway v. Dobson, 46 F. Supp. 114. This power is inherent and independent of statutes, Peters v. Mutual Life Ins. Co. of New York, 17 F. Supp. 246 (reversed on other grounds).

Unless otherwise provided by statute, a court ordinarily does not lose its power to open and vacate judgment merely on the lapse of the statutory period during which an appeal may be taken, Denholm & McKay Co. v. Commissioner of Internal Revenue, 132 F. (2d) 243. In the absence of a statute to the contrary, a court has full control over its orders or judgments and may, on sufficient cause shown, open or vacate its judgments, Zimmern v. U. S., 56 S. Ct. 706, 298 U. S. 167; U. S. v. Benz, 51 S. Ct. 113, 282 U. S. 304; Sun Oil Co. v. Buford, 130 F. (2d) 10 (reversed on other grounds); Suggs v. Mutual Ben. Health & Accident Assn., 115 F. (2d) 80; Arcoil Mfg. Co. v. American Equitable Assur. Co. of New York, 87 F. (2d) 206; American Guaranty Co. v. Caldwell, 72 F. (2d) 209; Associated Mfrs. Corp. of America v. DeJong, 64 F. (2d) 64; Obear-Nester Glass Co. V. Hartford-Empire Co., 61 F. (2d) 31; Massachusetts Fire & Marine Ins. Co. v. Schmick, 58 F. (2d) 130; Gentry v. State of Missouri ex rel. and to the use of Butler, 32 F. (2d) 159; McCandless v. Haskins, 28 F. (2d) 693; Cudahy Packing Co. v. City of Omaha, 24 F. (2d) 3 (cert. den.); Chicago, M. & St. Paul Ry. Co. v. Leverentz, 19 F. (2d) 915 (cert. den.); Maison Dorin Societe Anonyme v. Arnold, 16

F. (2d) 977; (cert. den.); Penn. R. R. Co. v. Montgomery, 6 F. (2d) 836; In re Vardaman Shoe Co., 52 F. Supp. 562; Leslie v. Floyd Gas Co., 11 F. Supp. 401; Greyerbiehl v. Hughes Electric Co., 294 Fed. 802 (cert. den.); etc.

In accordance with the rules governing the power and control of courts over their judgments as discussed in the preceding paragraph, it has been held that the inherent power of a court to open or vacate its judgment may be exercised at any time when the judgment is void, or when there has been a procedural or jurisdictional defect or where a question of fraud or other collateral issue is raised, Prudential Ins. Co. of America v. Zimmerer, 66 F. Supp. 492. The statute will not prevent the courts from acting on other grounds or causes which would be good and sufficient at common law, and an application based on such a ground is not governed by statute. In general a judgment can be set aside for various reasons even though it is not reversible, Ladd v. Stevenson, 19 N.E. 842 (N.Y.); North River Ins. Co. of City of New York v. Militello, 67 P. (2d) 625 (Colo.).

II. Does the Court Have Power to Open and Vacate An Improvident or Premature Judgment?

A judgment may be set aside where it was entered by the clerk without any authority therefor, whether his entry thereof was the result of mistake, inadvertence, or wrongful intent, and the same is true where the entry was ordered by the court inadvertently, improvidently or under a mistake. A judgment may be stricken off where it is entered without authority or by mis-

take. It has also been held that a judgment may be set aside where it was prematurely entered. O'neil v. Norton, 33 S.W. (2d) 733 (Tex.); Carter v. Shinsako, 108 P. (2d) 27 (Calif.).

III. Does a Meritorious Claim Affect the Court's Power to Open and Vacate Judgment?

If the party applying for an order opening or vacating a judgment shows the court he has a good and meritorious claim or defense, he is entitled to the order, Koen v. Beardsley, 63 F. (2d) 595; Peters v. Mutual Life Ins. Co. of New York, 17 F. Supp. 246 (reversed on other grounds).

IV. Mistake, Inadvertence, Surprise, Excusable Neglect, Casualty, or Misfortune.

A judgment taken against a person by mistake of fact, whereby the plaintiff fails to secure all to which he is entitled, a mutual mistake or misunderstanding of the parties, or a mistake of the court arising from misinformation or misunderstanding, or other mistake, may be set aside, Newton v. Weaver, 18 F. Cas. No. 10,193 (C.C.,D.C.). An irregular judgment for defendant, rendered in plaintiff's absence, should have been vacated and case restored to docket for trial on merits, Snow Hill Live Stock Co. v. Atkinson, 126 S.E. 610 (Ark.).

In a proper case, a trial court may open or vacate a judgment entered against a party as a result of the accident, mistake, negligence, or surprise of the party's attorney, Lovell v. Lovell, 176 N.E. 210 (Mass.); Collins v. National Bank of Commerce of San Antonio, 154 S.W. (2d) 296; Slatoski v. Jendro, 159 N.W. 752 (Minn.).

A party may also have an adverse judgment opened or vacated on the ground that he was prevented by unavoidable casualty or misfortune from properly prosecuting or defending, when the casualty is from causes beyond the party's control, In re Cox, 33 F. Supp. 796. If a party is prevented by sickness from preparing his case or attending the trial, and the circumstances are such that his personal attention and presence are necessary to the due protection of his rights, a judgment against him may be set aside on the ground of "casualty or misfortune" or "excusable neglect," Baker v. Owensboro Sav. Bank & Trust Co.'s. Receiver Co., 130 S.W. 969 (Ky.).

GREIVE AND LAW,
/s/ R. R. BOB GREIVE,
Attorneys for Claimants.

Office & Post Office:
4456 California Avenue,
Seattle 16, Washington,
Telephone: WEst 7-4111

In the United States District Court
For the State of Arizona

Phoenix Division

No. 2962 Phx
No. 2963 Phx

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife, and GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVITS

Come Now the plaintiffs and respectfully submit the attached affidavits of T. A. Loomis, M.D., Ph.D.; W. R. Gott, Joseph W. Bruce and Theresa M. Jessie.

GREIVE AND LAW,
/s/ By R. R. BOB GREIVE,
Attorneys for Plaintiffs.

Office and Post Office Address:
4456 California Avenue,
Seattle 16, Washington,
Telephone: WE 7-4111.

State of Washington, County of King—ss.

T. A. Loomis, being first duly sworn on oath, deposes and says: That he is a Doctor of Medicine, and operates a laboratory for toxicological investigations maintained by the State of Washington, at the University of Washington, School of Medicine; that he has conducted and published research materials on the effects of alcohol and on the dissipation of action of alcohol in human subjects; that he has conducted classes for police officers and others on the subject of alcohol and its effects on the human body for a period of many years; that he has made many lectures and a television "short" or recording on the subject, has made both personal appearances and on television, and has testified as an expert witness in many cases in the Courts of the State of Washington, and elsewhere, on the subject of liquor and its effects on the human being, and its dissipation.

Assuming that Mr. Cunningham and Mr. Price consumed liquor on October 3rd, 1959, and assuming further that they were intoxicated; assuming that Mr. Price had no alcoholic beverage for some 58 hours and that the trial date was set for Tuesday, October 6th, 1959, and assuming further that Mr. Cunningham had some liquor the following day, or on October 4th, and had no liquor or other intoxicating beverage after noon of said day, and assuming that at 2:00 o'clock P. M. on October 5th, 1959, Miss Virginia Hash and her brother, Edgar Hash, went to the hotel to discuss the case with Mr. Price and Mr. Cunningham, that it would have been physically impossible for either Mr. Price or Mr. Cunningham to have been under the influence of intoxicating liquor, and even assuming that Mr. Cunningham

was still under the influence, or partially under the influence of intoxicating liquor at 2:30 p.m. on October 5th, there would have been sufficient time in the remaining 19 hours to have sobered to the point that there would have been little, or a very minimal effect of alcohol still present at the time of trial on October 6th, 1959.

That affiant further states his reasons for the above opinion are as follows:

Acute intoxication with alcohol involves adequate consumption of this material to the extent that symptoms and behavior characteristic of alcoholic intoxication are manifested. The amount of alcohol necessary to produce such temporary symptoms without producing death varies within definite limits between individuals. Assuming that maximum acute non-lethal alcoholic intoxication occurs in an average adult human, and assuming that the individual then ceases the consumption of alcohol, in such an average adult human the alcohol within the body necessary to produce maximum acute non-lethal intoxication would be metabolized and excreted at a rate adequate so that at 24 hours following the cessation of the drinking, the alcohol would be practically absent from the body. Furthermore, any toxic symptoms from acute alcoholic intoxication and caused by alcohol would be absent from the subject.

/s/ T. A. LOOMIS, M.D.

Subscribed and Sworn to before me this 10 day of December, 1959.

/s/ GRACE UYEDA,

[Seal] Notary Public in and for the State of Washington, residing at Seattle.

State of Arizona, County of Maricopa—ss.

W. R. Gott, being first duly sworn, upon his oath, deposes and says:

My name is W. R. Gott; I live at 515 East Moreland, Phoenix, Maricopa County, Arizona. I am employed as Desk Clerk at the Sahara Motor Hotel, located at 401 North First Street, Phoenix, Arizona and was so employed on October 4, 1959.

Around noon on Sunday, October 4, 1959, Mr. G. A. Price came to me explaining he and Mr. W. C. Cunningham had a court case coming up Tuesday morning and that he was worred about Mr. Cunningham and asked me to request the bar not to serve him any more drinks.

I told the bartender not to serve Mr. Cunningham or Mr. Price and further directed the relief man be told not to serve them either. I found out some time later that Mr. Price had contacted the bell boys and told them not to bring any liquor to their room if any was ordered.

On Monday, October 5, 1959, some time before lunch I had a short conversation with both Mr. Price and Mr. Cunningham and, in my opinion, both looked and acted normal and I did not notice any trace of odor.

Further affiant sayeth not.

/s/ W. R. GOTT.

Subscribed and sworn to before me this 8th day of November, 1959.

[Seal] /s/ SHIRLEY R. ORD,
Notary Public.

My commission expires: April 4, 1960.

State of Arizona, County of Maricopa—ss.

Joseph W. Bruce, being first duly sworn, upon his oath deposes and says:

My name is Joseph W. Bruce.

I live at 4201 West Cavalier Drive, Glendale, Arizona.

On October 4, 1959, I was employed at the Sahara Motor Hotel, 401 North First Street, Phoenix, Arizona, as a bartender.

On Sunday, October 4, 1959, I was told by Desk Clerk Bob Gott that I was not to serve either Mr. W. C. Cunningham or Mr. G. A. Price any drinks and, at the end of my shift, I was to pass this information on to my relief and this I did when he arrived about 5:30 p.m.

They came in once during my shift and ordered 7-Up. This was some time late afternoon or early evening. They stayed for quite a while.

I was surprised as I assumed that drinks had been cut off for the reason they had already had enough and as near as I could tell, both talked and acted O.K.

I later found out that both Mr. Price and Mr. Cunningham had requested no drinks as a precautionary measure.

Further affiant sayeth not.

Dated this 8th day of November, 1959.

/s/ JOSEPH W. BRUCE.

Subscribed and sworn to before me this 8th day of November, 1959.

[Seal] /s/ SHIRLEY R. ORD,
Notary Public.

My commission expires: April 4, 1950.

State of Arizona, County of Maricopa—ss.

Theresa M. Jessie, being first duly sworn, upon her oath deposes and says:

My name is Theresa M. Jessie. I reside at 464 South LeBaron Street in Mesa, Arizona.

On October 6, 1959, I was employed as a sales clerk in the gift shop at the Sahara Motor Hotel, 401 North First Street, Phoenix, Arizona.

Mr. W. C. Cunningham came in the gift shop several times buying different items, mainly two sets of ash trays and two sets of Indian dolls. He told me they were for his wife and a friend's wife and so he wanted his friend, Mr. Price (Mr. G. A. Price) to approve them. When Mr. Cunningham and Mr. Price left on Tuesday, October 6, 1959, they were both completely sober to the best of my knowledge.

Further affiant sayeth not.

Dated this 8th day of November, 1959.

/s/ THERESA M. JESSIE.

Subscribed and sworn to before me this 8th day of November, 1959.

[Seal] /s/ SHIRLEY R. ORD,
Notary Public.

My commission expires: April 4, 1960.

State of Washington, County of King—ss.

Dr. Forrest L. Flashman, being first duly sworn on oath, deposes and says: That he is a medical doctor, specializing in orthopedic practice; that he was treating William Cunningham for a back condition when in mid-August, 1959, there was a flare up; that in the early part of September it was determined this flare up was the result of an acute case of shingles; that shingles is a very painful and aggravating condition; that as a result of this condition, Mr. Cunningham's history indicates he lost considerable sleep and required extensive pain killers; that he prescribed Emperin with codine which is a narcotic and Darvin compound which is a muscle relaxant; that when he last saw Mr. Cunningham on September 16, 1959 he was still suffering from shingles and still had a part of the above named prescription in his possession.

/s/ FORREST V. FLASHMAN.

Subscribed and sworn to before me this 26th day of December, 1959.

[Seal] /s/ R. R. BOB GREIVE,
Notary Public in and for the State of Washington, residing in Seattle.

In the United States District Court
for the State of Arizona

Phoenix Division

No. 2962 Phx.
No. 2963 Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife, and GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

AFFIDAVIT

State of Washington, County of King—ss.

G. A. Price, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs in the above entitled action; that he and Mr. Cunningham flew to Phoenix, Arizona on October 1, 1959 for the purpose of appearing as plaintiffs and witnesses; that on the way down he had a drink with his dinner; that he again, accompanied by Mr. Cunningham, participated in drinking alcoholic beverages on the night of October 3, 1959 and became intoxicated at that time; that Mr. Price did not imbibe in alcoholic beverages from that time until after the time set for trial on October 6, 1959, which is a period of 58 hours; that on Sunday, October 4, 1959 he contacted the desk clerk at the Sa-

hara Motor Hotel and informed him that both the affiant and Mr. Cunningham were to appear in a court action on Tuesday and as a precautionary measure they did not want any further drinks served to either of them.

Affiant further states: That on Monday, October 5, 1959, at 2:00 o'clock p. m., when the affiant was fully sober, Miss Hash and her brother Edgar came to the hotel to discuss the impending law suit. At that time Miss Hash reacted violently, in particular to the appearance of Mr. Cunningham, who had been suffering from shingles. Miss Hash contended both the affiant and Mr. Cunningham gave the appearance of being drunk. The affiant said he had had no liquor or other intoxicating beverages since Saturday about midnight, a period of 38 hours, that he was sober and intended to be sober at the time of the trial, to which Miss Hash countered the Judge would throw the case out of court and possibly throw both of them in jail; that the affiant, not being acquainted with any other lawyer in the city of Phoenix, was forced to accept whatever disposition Miss Hash decided to make of the matter; that the affiant admits he and Mr. Cunningham should not have become intoxicated on Saturday night.

Affiant further states: That he does not question the sincerity of Miss Hash in her belief that Mr. Cunningham was intoxicated, but in the opinion of the affiant Mr. Cunningham was not drunk; that under the circumstances he feels the matter should have been

continued until such time as he could have arranged for other counsel and it should not have been dismissed with prejudice.

/s/ G. A. PRICE.

Subscribed and sworn to before me this 9th day of December, 1959.

[Seal] /s/ R. R. BOB GREIVE,
Notary Public in and for the State of Washington, residing at Seattle.

In the United States District Court
for the State of Arizona

Phoenix Division

No. 2962 Phx.
No. 2963 Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife, and GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

State of Washington, County of King—ss.

William Cunningham, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs in

the above entitled action which was dismissed with prejudice on October 5, 1959, on the grounds the affiant and Mr. G. A. Price were inebriated and thus incapacitated and unable to continue as plaintiffs; that prior to October 1, 1959 affiant had not drunk any intoxicating liquor for more than a year; that upon October 1, 1959 the affiant had one drink with his dinner and on the night of October 3, 1959, while dining in one of the local restaurants in Phoenix, the affiant did become intoxicated; that on Sunday, October 4, 1959 the affiant had two bottles of beer but he had no further alcoholic beverages after twelve o'clock noon on that day.

As a precautionary measure, Mr. G. A. Price contacted Mr. Gott, the desk clerk at the Sahara Motor Hotel, and asked him not to serve either he or Mr. Cunningham any more alcoholic beverages and they were not given any either at the hotel or anywhere else after twelve o'clock noon October 4, 1959; that at approximately two o'clock Monday, October 5, 1959, Miss Virginia Hash and her brother Edgar Hash came to the hotel to discuss the case; that for two weeks immediately prior to September 30, 1959 the affiant had been under treatment for shingles by Dr. John Stewart and Dr. Forrest Flashman, 1120 Cherry Street, Seattle, Washington and Dr. Groh of Vashon, Washington; that he was experiencing considerable pain and discomfort and his physical appearance had changed drastically during the ten days immediately preceding the trip to Phoenix and in fact he had lost 25 pounds which left him in a weakened condition, presenting a

shaky and unsteady appearance, with his eyes red from lack of sleep and there was some question as to whether or not he would be able to go to Phoenix for the trial of the above entitled action; that while neither the affiant nor Mr. G. A. Price had drunk any intoxicating liquor for more than twenty-four hours, the affiant did present a very poor physical appearance because of loss of sleep and loss of weight which was the result of his attack of shingles and there is no question that his attorney, Miss Hash, believed the affiant was intoxicated; that Miss Hash and the client had a disagreement over this question, and she informed the affiant she would be unable to continue with his case; that Miss Hash contended that even though some third party might question whether or not the affiant was sober, nevertheless they had been drinking the day before and the appearance presented by the affiant was so poor that in her opinion the judge would be unwilling to permit the trial and there was a strong possibility he might hold Mr. Price and the affiant in contempt of court and as a result they might end up in jail.

Affiant further states: That under these circumstances he was in a helpless position, not being acquainted with any other lawyers in the city of Phoenix and realizing no other lawyer would be able to prepare his case in the twenty hours which remained before trial, so the affiant had no choice but to accept the situation as presented by Miss Hash; that the affiant does not believe his case should have been dismissed with prejudice; that he feels he has a good cause against the U. S. Government.

Affiant further states: That he was not drunk and while he does not question Miss Hash's sincerity, he does feel she was mistaken.

/s/ WILLIAM C. CUNNINGHAM.

Subscribed and sworn to before me this 9th day of December, 1959.

[Seal] /s/ R. R. BOB GREIVE,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Feb. 8, 1960.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION UNDER RULE 60.

Comes Now the defendant pursuant to the authorization of the Court on Monday, February 8, 1960, at the hearing held on that day, and files its Supplemental Memorandum.

The Court will recall that on the date of the hearing plaintiffs' counsel appeared in person, associated local counsel, and filed this Memorandum of Authorities in Support of Motion to Open and Vacate Judgment. The effect of the memorandum is to abandon paragraphs 1, 3, 4, and 5 of their Motion to Vacate

Judgment and base the motion on paragraphs 2 and 6 which are as follows:

* * *

"2. Mistake, inadvertence, surprise, or excusable neglect;"

* * *

"6. Any other reasons justifying relief from the operation of the judgment of dismissal, as presented by the plaintiffs in affidavits submitted herewith."

* * *

In order to save space and time I will comment on each paragraph discussed by the plaintiffs:

I. Does the Court have inherent power to open and vacate a judgment? In Federal Court under the Federal Rules of Civil Procedure "inherent" is a moot point. There is express authority under Rule 60 for the United States District Courts to review their judgments and orders. It has been repeatedly held that a motion under Rule 60(b) is addressed to the sound discretion of the Court:

Independence Lead Mine Co. vs. Kingsbury (C. C. A. 9—1949) 175 F. 2d 983, cert. den. 338 U. S. 900;

Stafford vs. Russel, (C. C. A. 9—1955) 220 F. 2d 853;

Perrin vs. Aluminum Co. of America (C. C. A. 9—1952) 197 F. 2d 254;

Cole vs. Fairway Dev., (C. C. A. 9—1955) 226 F. 2d 175;

Clarence A. Kolstad vs. United States (C. C. A. 9—1959) ..... F. 2d ..... (Jan. 7, 1959, No. 15871).

II. Does the Court have power to open and vacate an improvident or premature judgment? There is no question but that within the Court's sound discretion, as outlined in I, heretofore, that the Court has such power. In this case, however, there is no judgment. The Court dismissed the plaintiffs' cases for failure to prosecute. The Court will recall that we met in chambers before the time set for trial; that we went into open Court at the time set for trial; that the cases were called and the plaintiffs were not ready while the defendant was ready; that plaintiffs' counsel requested to withdraw as counsel and that the request was granted; and finally, that my motion for dismissal and costs for failure to prosecute was granted under Rule 14, Rules of this Court.

There is no judgment to be set aside under Rule 60 (b). Plaintiffs need only file their action again.

III. Does a meritorious claim affect the Court's power to open and vacate judgment? Apparently not. Paragraph I stands for the proposition that the sound discretion of the Court is the basis of the determination and not a meritorious claim.

IV. Mistake, inadvertence, surprise, excusable neglect, casualty or misfortune. Apparently plaintiffs' contention is that they were not so drunk on the morning of the trial that they couldn't have appeared and prosecuted the case if their own attorneys had not kept them out of the Courthouse. The fact is clear, however, that they did not appear at the Courthouse at the time and place designated for trial. They are, we suppose, mature persons. They knew the time and place of trial through their attorney in Tacoma, Washington,

and it appears strongly probable that they must have been in an alcoholic fog or else they would have navigated their persons to the appointed place of the trial regardless of what counsel told them. We were not contacted by the plaintiffs on the trial date, or thereafter, with protestations that they had been misused or prevented from appearing.

Conclusion: This case was dismissed for want of prosecution. Plaintiffs may file the action again if they so desire. The degree of drunkenness of the plaintiffs seems like a very poor basis upon which to exercise sound discretion and set aside the order of dismissal. Defendant prays that the Court deny the motion.

/s/ JACK D. H. HAYS,
United States Attorney,
/s/ By WILLIAM E. EUBANK,
Assistant United States Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail Attached.
[Endorsed]: Filed April 14, 1960.

[Title of District Court and Cause.]

MINUTE OF THE COURT

Dated: Thursday, April 28, 1960, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix
Civ-2963 Phoenix

It Is ordered that Plaintiffs' Motion to Vacate Judgment is denied.

(Docketed 4/28/60.)

Fidelity and Casualty Company
Of New York
Home Office New York

In The United States District Court,
For The State Of Arizona
Phoenix Division

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

NOTICE OF APPEAL

Comes Now the plaintiffs herein give notice that they, and each of them, appeal from the order denying their motion to vacate or set aside judgment herein; and from each and every other order entered in this cause.

Dated this 27th day of May, 1960.

GREIVE AND LAW,
/s/ By CHARLES LAW,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 13, 1960.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That We, William Carl Cunningham, et ux and Glenn A. Price, et ux, the plaintiffs above named, as Principal, and The Fidelity and Casualty Company of New York, a corporation organized under the laws of the State of New York, and authorized to transact the business of Surety in the States of Arizona and Washington, as Surety, are held and firmly bound unto United States of America, the defendant above named in the just and full sum of Five Hundred Dollars ($500.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of May, 1960.

The Condition of This Obligation Is Such, That Whereas, the above named United States of America, on the 8th day of October, 1959, in the above entitled action and court, recovered judgment against the plaintiffs above named for $223.90 costs which have been paid; and

Whereas, the plaintiffs above named petitioned for reinstatement of their claims against United States of America by motion to vacate judgment and said motion was denied by order of the above entitled court on April 29, 1960; and

Whereas, the above named Principals have heretofore given notice of appeal from said order,

Now Therefore, if the said Principal William Carl Cunningham, et ux and Glenn A. Price, et ux, shall pay to United States of America, the defendant above named, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Five Hundred Dollars ($500.00), then this obligation to be void; otherwise to remain in full force and effect.

[Seal] WILLIAM CARL CUNNINGHAM,
By RODERICK D. DIMOFF of
GREIVE & LAW,
Attorney in Fact.
GLENN A. PRICE,
By RODERICK D. DIMOFF of
GREIVE & LAW,
Attorney in Fact.
FIDELITY AND CASUALTY
COMPANY OF NEW YORK,
/s/ EUGENE D. FOX,
Attorney.

The foregoing bond approved this .... day of....., 19....

.....
Judge.

The Fidelity and Casualty Company of New York

GENERAL POWER OF ATTORNEY

Know All Men by These Presents, that the Fidelity and Casualty Company of New York has made, constituted, and appointed, and by these presents does make constitute, and appoint

Eugene D. Fox of Seattle, Washington

its true and lawful attorney for it and in its name, place and stead to execute on behalf of the said Company, as surety, bonds, undertakings and contracts of suretyship to be given to

all obligees

provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in amount the sum of Two Hundred Fifty Thousand ($250,000) Dollars.

This Power of Attorney is granted and is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of The Fidelity and Casualty Company of New York at a meeting duly called and held on the 16th day of October, 1957:

"Resolved, that the Chairman of the Board, the President, an Executive Vice President or any Vice President of the Company, be, and that each or any of them hereby is, authorized to execute Powers of Attorney qualifying the attorney named in the given Power of Attorney to execute in behalf of The Fidelity and Casualty Company of New York, bonds, undertakings and all contracts of suretyship; and that any Secretary or any Assistant Secretary be, and that each or any of

them hereby is, authorized to attest the execution of any such Power of Attorney, and to attach thereto the seal of the Company.

Further Resolved, that the signatures of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed and in the future with respect to any bond, undertaking or contract of suretyship to which it is attached."

In Witness Whereof The Fidelity and Casualty Company of New York has caused its official seal to be hereunto affixed, and these presents to be signed by one of its Vice Presidents and attested by one of its Secretaries this 31st day of March, 1959.

The Fidelity and Casualty Company of New York,

[Seal] /s/ CARROLL R. YOUNG,
Vice-President.

Attest:

/s/ A. J. MILLER,
Secretary.

State of New York, County of New York—ss.

On this 31st day of March, 1959, before me personally came Carroll R. Young, to me known, who being by me duly sworn, did depose and say: that he resides in Berkeley Heights in the County of Union, State of New Jersey, at 23 Ridge Drive East; that he is a Vice-

President of The Fidelity and Casualty Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal] /s/ ROBERT J. METTALIA,
Notary Public,

State of New York No. 41-2675700,
Qualified in Queens County,
Certificate Filed in New York County,
Term Expires March 30, 1961.

State of New York, County of New York—ss.

I, the undersigned, a Secretary of The Fidelity and Casualty Company of New York, a New York corporation, Do Hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore that the Resolution of the Board of Directors, set forth in the said Power of Attorney, is now in force.

Signed and sealed at the City of New York. Dated the 26th day of May, 1960.

[Seal] /s/ A. J. MILLER,
Secretary.

Bond 4315A.

[Endorsed]: Filed June 13, 1960.

[Letter head]

Registered
Air Mail

Mr. William H. Loveless, Clerk
United States District Court
District of Arizona
Phoenix, Arizona

Re: Civ-2962 Phx., Cunningham vs. U.S.A.
Civ-2963 Phx., Price vs. U.S.A.

Dear Sir:

Please file the following papers in our appeal:

1. Order dispensing pretrial conference, filed October 5, 1959.
2. Motion and Order dismissing Hash and Hash as counsel for plaintiffs, filed October 6, 1959.
3. Order of Dismissal, filed October 6, 1959.
4. Plaintiffs' Motion to Vacate Judgment, lodged December 28, 1959 and filed February 8, 1960.
5. Order denying Plaintiffs' Motion to Vacate Judgment, entered April 28, 1960.
6. Plaintiffs' Notice of Appeal, filed June 13, 1960.
7. Plaintiffs' Bond for Costs on Appeal, filed June 13, 1960.

Enclosed is a check for $20.00, as down payment for transcript. We will send the rest upon receipt of the exact statement. Please file these.

Very truly yours,

GREIVE AND LAW,
/s/ By RODERICK D. DIMOFF.

RDD:eb
cc: U. S. Attorney General

[Endorsed]: Filed June 29, 1960.

In the United States District Court
for the District of Arizona

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COUNTERDESIGNATION OF RECORD ON APPEAL

Pursuant to the Federal Rules of Civil Procedure, the defendant-appellee hereby designates for inclusion in the record of appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed June 13, 1960, the following: all of the record, proceedings and evidence in this action.

/s/ JACK D. H. HAYS,
United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 7, 1960.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor, It Is Ordered that the Plaintiffs' time within which to file the record on appeal and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit, is hereby extended to and including August 6, 1960.

Dated this 25th day of July, 1960.

/s/ DAVE W. LING,
Judge,
United States District Court for the District of Arizona.

[Endorsed]: Filed July 27, 1960.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in case No. 2962 Phoenix, William Carl Cunningham, et ux, Plaintiffs, vs. The United States of America, Defendant, and case No. Civ-2963 Phoenix, Glenn A. Price, et ux, Plaintiffs, vs. The United States of America, Defendant, on the docket of said court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing

thereon are the originals of said documents filed in said cases, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of minute entries constitute the record on appeal in said cases as designated and the same are as follows, to wit:

1. Plaintiffs' Complaint (Civ-2962 Phx.)
2. Plaintiffs' Amended Complaint (Civ-2962 Phx.)
3. Plaintiffs' Complaint (Civ-2963 Phx.)
4. Defendant's Answer (Civ-2962 Phx.)
5. Defendant's Answer (Civ-2963 Phx.)
6. Plaintiffs' Motion to Consolidate for trial (Civ-2962 Phx. and Civ-2963 Phx.)
7. Minute entry of January 19, 1959 (order setting and consolidating cases for trial, Civ-2962 Phx. and Civ-2963 Phx.)
8. Deposition of Thomas J. McIntyre (Civ-2962 Phx. and Civ-2963 Phx.)
9. Deposition of Ray Edward Ramaker (Civ-2962 Phx. and Civ-2963 Phx.)
10. Defendant's Request for Answers to Interrogatories (Civ-2962 Phx.)
11. Defendant's Request for Answers to Interrogatories (Civ-2963 Phx.)
12. Plaintiffs' Answer to Interrogatories (Civ-2963 Phx.)

13. Deposition of Bernard John Oswald (Civ-2963 Phx.)
14. Deposition of Dr. Forrest L. Flashman (Civ-2962 Phx. and Civ-2963 Phx.)
15. Deposition of Dr. R. E. Ramaker (Civ-2962 Phx. and Civ-2963 Phx.)
16. Plaintiffs' Answer to Interrogatories (Civ-2962 Phx.)
17. Minute entry of October 5, 1959 (pretrial proceedings, Civ-2962 Phx. and Civ-2963 Phx.)
18. Minute entry of October 6, 1959 (order of dismissal on trial date, Civ-2962 Phx. and Civ-2963 Phx.)
19. Defendant's Memorandum of Costs and Disbursements (Civ-2962 Phx.)
20. Defendant's Memorandum of Costs and Disbursements (Civ-2963 Phx.)
21. Plaintiffs' Motion to Vacate Judgment pursuant to Rule 60 (Civ-2962 Phx. and Civ-2963 Phx.)
22. Defendant's Memorandum in Opposition to Plaintiffs' Motion under Rule 20 (Civ-2962 Phx. and Civ-2963 Phx.)
23. Defendant's Motion for Security of Costs (Civ-2962 Phx. and Civ-2963 Phx.)
24. Defendant's Notice of hearing motions (Civ-2962 Phx. and Civ-2963 Phx.)
25. Defendant's Satisfaction of Memorandum of Costs (Civ-2962 Phx. and Civ-2963 Phx.)

26. Minute entry of February 8, 1960 (hearing on Motion to Vacate Judgment, Civ-2962 Phx. and Civ-2963 Phx.)

27. Plaintiffs' Memorandum of Authorities in Support of Motion to Vacate Judgment (Civ-2962 Phx. and Civ-2963 Phx.)

28. Supplemental Memorandum in Opposition to Plaintiffs' Motion under Rule 60 (Civ-2962 Phx. and Civ-2963 Phx.)

29. Minute entry of April 28, 1960 (Order Denying Motion to Vacate Judgment, Civ-2962 Phx. and Civ-2963 Phx.)

30. Plaintiffs' Notice of Appeal (Civ-2962 Phx. and Civ-2963 Phx.)

31. Plaintiffs' Bond for Costs on Appeal with Fidelity and Casualty Company (Civ-2962 Phx. and Civ-2963 Phx.)

32. Plaintiffs' Designation (Civ-2962 Phx. and Civ-2963 Phx.)

33. Defendant's Counterdesignation of Record on Appeal (Civ-2962 Phx. and Civ-2963 Phx.)

34. Order Extending Time for Transmitting Record on Appeal (Civ-2962 Phx. and Civ-2963 Phx.)

Witness my hand and the seal of said Court this 27th day of July, 1960.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 17049. United States Court of Appeals for the Ninth Circuit. William Carl Cunningham, et ux., and Glenn A. Price, et ux., Appellants, vs. United States of America, Appellee. Transcript of Record. Upon appeal from the United States District Court for the District of Arizona.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17049

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

GLEN A. PRICE and JANE DOE PRICE, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' STATEMENT OF POINTS

To: The clerk of the above entitled court:

To: The clerk of the United States District Court for the District of Arizona, Phoenix Division:

To: Jack D. Hays, United States Attorney, attorney for the Appellee:

Come Now the appellants and respectfully submit a statement of the points on which they intend to rely on appeal as follows, to-wit:

1. They claim error and abuse of discretion on the part of the District Judge in dismissing their case;

2. They claim error and abuse of discretion on the part of the District Judge in failing to grant their motions to vacate and set aside judgment previously entered, particularly in view of the fact that their affidavits and irrefutable record in their favor was never impeached;

3. They claim error and abuse of discretion on the part of the District Judge in denying their motions to vacate and set aside judgment previously entered in favor of the defendant-appellee.

GREIVE AND LAW,
attorneys,
/s/ By RODERICK D. DIMOFF,
Roderick D. Dimoff,
for the appellants.

4456 California Avenue,
Seattle 16, Washington,
Telephone: WEst 7-4111.

[Endorsed]: Filed Jan. 26, 1961. Frank H. Schmid, Clerk.